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IN THE

Supreme Court of the United States

October Term, 1969
No. 768

THE BOYS MARKETS, INC.,

Petitioner,

vs.

RETAIL CLERK'S UNION, LOCAL 770,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

APPENDIX.

Docket Entries—United States District Court for the Central District of California.

TITLE OF CASE

The Boys Markets, Inc., a California corporation, Plaintiff, vs. Retail Clerks Union, Local 770, an unincorporated association, Defendant.

ATTORNEYS

For plaintiff: Joseph M. McLaughlin, 627-5237, 655 South Hope St., Suite 700, Los Angeles, Calif. 90017.

For defendant: Arnold, Smith & Schwartz, 653-6510, 6404 Wilshire Blvd., Suite 950, Los Angeles, Calif. 90048.

PETN FOR REMOVAL FR L.A. SUPERIOR COURT COMPLT FOR INJNCTN & FOR SPECIFIC PERFORMANCE OF AGREEMT TO ARBITRATE

PROCEEDINGS

2/20/69—Fld Petn for Removal from State Court for the County of Los Angeles, with copies of the following docs: (1) Ord to show cause & TRO, (2) memo of pts and authors in support of injnctn etc. (3) Declaratn of Vern Heaps (4) summs (5) Complt for TRO, Prelim and Perm injnctn and for specific performance of agreement to arbitrate. Md JS-5. Fld. Bond on removal in the amt of $500.00/

2/24/69—Fld Ord (CC) shortening time for Not of Mot to 3/10/69, 10AM.

2/25/69—Fld Mot & Not of Mot to quash superior court temporary restraining Ord, retnble 3/10/69, 10 am; memo of pts & auths in suppt of Mot and in

suppt of Ord shortng time; affid of Gerald A. W. Haight with certificate of service.

3/3/69—Fld Order (CC) shortening time in wh pltff may serve notc of motn to 3/4/69 & sd motn be hrd 3/10/69, 10am. Fld pltff's motn for Order compelling arbitration; for Order requirg specific performance of agreement to arbitrate; and application for preliminary injunction, w/notc of hrg on motns retnble 3/10/69, 10am. Fld pltffs supplemental memo of pts & auths in support of motns to compel arbitration, etc.

3/13/69—Fld finds of fact & concl of law: Fld ord directing that arbitration proceed and Order grantg inj pending arbitration, fur ord that deft, etc are enjoined from picketing, etc., pending arbitration, etc. (Ent 3/13/69 ntfd prtys) JS-6

3/13/69—Fld deft's ANSWER to Complaint.

3/14/69—Fld deft's NOTICE OF APPEAL. Mld copy to Joseph M. McLaughlin at address is Suite 700, 655 South Hope St., L.A. 90017, copy to (CC) and copy to deft at time of filing. Fld bond on appl in the amt of $250.00.

3/17/69—Fld Bond On injnctn in the amt of $1,000.00.

3/18/69—Fld def's designation of Record on Appeal. Fld statement of pts on which appellant intends to rely on appeal.

3/10/69—Hrg & ent ord denyg mo deft to quash restr ord & ent ord grantg mo plf for arbitration & injunc, & court directs counsel for plt to prep written ord.

3/27/69—Fld def's designation of Record on Appeal.

4/2/69—Fld Deft's NOTICE OF APPEAL. Fld designation of Record on appl. Fld stmt on points on which appellant intends to rely on appl. Fld proof of service on the above docs. (copy of N/A to CC)

4/10/69—Fld def's . supplemental designation of Record on Appeal.

I hereby attest and certify on May 9, 1969 that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

JOHN A. CHILDRESS
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF
CALIFORNIA

By ....., Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

THE BOYS MARKETS, INC., a California corporation,

Plaintiff,

- vs -

RETAIL CLERKS UNION, LOCAL 770, an unincorporated association,

Defendant.

No. 948323

Original Filed Feb. 19, 1969 County Clerk.

Complaint for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction, and for Specific Performance of Agreement to Arbitrate.

Plaintiff complains of defendant and for cause of action alleges:

I

Plaintiff, THE BOYS MARKETS, INC., is now and has been at all times herein mentioned a corporation duly organized and existing under the laws of the State of California.

II

Defendant, RETAIL CLERKS UNION, LOCAL 770, is now and has been at all times herein mentioned, an unincorporated association functioning as a labor organization and affiliated with the RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO. Said defendant may hereinafter be referred to as "Local

770". Local 770 is composed of several thousand members who are employed as Retail Clerks in supermarkets, drug stores, discount stores and other retail establishments and who are represented for collective bargaining purposes by said labor organization. The principal offices of Local 770 are located in the County of Los Angeles, California.

III

Plaintiff owns and operates a chain of approximately 35 retail food supermarkets in and about Southern California, one of which said stores is located at 7230 Atlantic Boulevard, in the City of Cudahy, County of Los Angeles. In each of said supermarkets, plaintiff stocks, displays and sells to its customers a wide variety of groceries, meats, produce, general merchandise and sundry non-food products. Plaintiff employs several hundred retail clerks in said stores who are represented for collective bargaining purposes by defendant Local 770.

IV

On or about April 1, 1964, plaintiff and defendant Local 770 executed and entered into a contract in writing providing for and establishing the wages, hours, benefits and conditions of employment for the employees of plaintiff employed as retail clerks who are represented by Local 770. Said contract, known as the "Retail Food, Bakery, Candy, and General Merchandise Agreement, April 1, 1964—March 31, 1969" was for a five-year term, and is in full force and effect through March 31, 1969. A true and correct printed copy of

said contract is attached hereto as Exhibit "A" and by reference made a part hereof.

For and in consideration of the wages, benefits and conditions of employment required to be provided by plaintiff under and pursuant to the terms of said contract to the employees covered thereby, Local 770 promised, covenanted and agreed that the Union and its members, employees of plaintiff, would not engage in any strike, work stoppage or other concerted economic activity against plaintiff for the term of said collective bargaining agreement. Article XIV, Paragraph D of the contract provides as follows:

"ARTICLE XIV . . .

"D. POWERS, LIMITATIONS AND RESERVATIONS. . . .

"2. Work Stoppages. Matters subject to the procedures of this Article shall be settled and resolved in the manner provided herein. During the term of this Agreement, *there shall be no cessation or stoppage of work, lock-out, picketing or boycotts,* except that this limitation shall not be binding upon either party hereto if the other party refuses to perform any obligation under this Article or refuses or fails to abide by, accept or perform a decision or award of an arbitrator or board." (Emphasis added).

In further such consideration, Local 770 promised, covenanted and agreed that any and all controversies, disputes and disagreements of any kind or character between them arising out of or in any way involving

the interpretation or application of the terms of said contract, which could not be mutually resolved or settled, would be submitted to an impartial arbitrator for binding determination. Article XIV, Paragraphs "A" and "C" of said contract provide as follows:

"ARTICLE XIV

"ADJUSTMENT AND ARBITRATION

"A. CONTROVERSY, DISPUTE OR DISAGREEMENT. *Any and all matters of controversy, dispute or disagreement* of any kind or character existing between the parties and arising out of or in any way involving the interpretation or application of the terms of this Agreement, except as may be otherwise provided in Paragraph D of this Article, shall be settled and resolved by the procedures and in the manner hereinafter set forth." (Emphasis added).

"B. ADJUSTMENT PROCEDURE. . . .

"C. ARBITRATION. . . .

"4. The arbitrator or board of arbitration shall be empowered to hear and determine the matter in question and the determination shall be final and binding upon the parties, subject only to their rights under law. The hearings shall be held within thirty (30) days after the selection of the arbitrator, or board, which shall have the power to decide the date or dates upon which the arbitration is to be held if agreement cannot be reached by the parties."

V

On Tuesday, February 18, 1969, plaintiff and defendant became involved in a controversy, dispute and disagreement over and concerning the performance of certain work in plaintiff's supermarket located at 7230 Atlantic Boulevard, Cudahy, California. Plaintiff's frozen foods supervisor and his crew had commenced revamping the display of frozen food products in four frozen food cases located within said market. The physical location of various products already in the cases was changed and the display was revised in order to be more attractive to customers. Representatives of Local 770 objected to the fact that this work was being performed by plaintiff's supervisor and his crew, and demanded that the said frozen food cases be stripped of all merchandise by plaintiff's retail clerks; that the merchandise be returned to the main freezer room in the back room of the store; and that members of the Union be required to entirely restock and redisplay the merchandise in the cases. Said representatives threatened that if their demands were not met, the Union would engage in a strike against plaintiff; would require all of plaintiff's retail clerks to leave their employment and engage in a strike and that the union would picket plaintiff's said store.

VI

Plaintiff, acting in the good-faith belief that it had not breached or violated any of the provisions of its contract with Local 770, refused to agree to the demands of the representatives of said Union. Thereupon, at approximately 3:15 P.M. of said day, Local 770's representatives ordered, instructed and required all of the retail clerks employed by plaintiff in said store to

leave their employment and to engage in a strike and work stoppage in breach and violation of their contract with plaintiff. All of said employees immediately ceased to perform their work for plaintiff and left the store. Local 770 established a picket line on and about the premises of plaintiff's store. The pickets carried picket signs reading:

"LOCAL 770
THIS STORE ON STRIKE
PLEASE RESPECT OUR PICKET LINES"

Other representatives of Local 770 stationed themselves in front of the entrances to the said store of plaintiff and falsely stated to customers and potential customers of plaintiff that the store was "closed" and that there was "no service" in the store.

Said strike, work stoppage and picketing continued on Wednesday, February 19, 1969. On said date the representatives of Local 770 repeatedly told customers of plaintiff not to come in plaintiff's said store and to take their patronage to plaintiff's competitors. Said representatives stationed themselves directly in front of the entrances to plaintiff's store and impeded and blocked customers attempting to enter. Furthermore, said representatives encouraged and persuaded employees of plaintiff's suppliers not to deliver products to plaintiff's store.

VII

The strike and work stoppage engaged in by Local 770 and its members, employees of plaintiff, which commenced on February 18, 1969, and continues to the time of filing of this complaint, was and is in substantial and material breach of defendant's contract with plaintiff and of the "no-strike" and arbitration provisions

thereof. The controversy, dispute and disagreement between plaintiff and defendant concerning the performance of work within plaintiff's said store clearly involves the interpretation and application of the provisions of their contract and is thereby required by the express terms of said contract to be submitted for determination to binding arbitration without such strike and work stoppage.

VIII

As a direct and proximate result of the strike, picketing and work stoppage engaged in by defendant, plaintiff has suffered and continues to suffer substantial and serious loss of business and customer patronage, all to plaintiff's damage and injury.

By reason of said strike and work stoppage, defendant has caused plaintiff to be unable to properly and adequately replenish and stock the shelves and racks of said store with merchandise. Further, defendant has prevented plaintiff's retail clerks from being on duty to serve its customers, and check them out at the cash registers. The inability of customers to purchase desired products in plaintiff's store and to be served and waited upon by plaintiff's employees has serious economic consequences to plaintiff's business in that plaintiff may lose the valued patronage and good will of unknown numbers of customers who, being unable to shop at plaintiff's store or being reluctant to cross defendants picket line, take their patronage to plaintiff's competitors, and plaintiff may lose their business and patronage forever.

IX

By reason of the strike, picketing and work stoppage engaged in by Local 770 and its members, plaintiff has

sustained great and irreparable injury and, so long as said strike, picketing and work stoppage is permitted to continue, will continue to sustain great and irreparable injury in that plaintiff will be unable to serve its customers and will lose the patronage of customers who will take their trade to plaintiff's competitors because of plaintiff's lack of employees and of the picket line at plaintiff's premises.

X

Plaintiff has observed and performed all of the terms and conditions of its contract, on its part to be observed and performed. Immediately upon the commencement of the strike, picketing and work stoppage by Local 770 and its members, employees of plaintiff, plaintiff caused a telegram to be sent to said Union demanding that the said dispute be submitted to arbitration and that defendant cease and desist from the strike and work stoppage, all as required by the contract between the parties. Local 770 failed and refused, and continues to fail and refuse to agree to arbitrate the said dispute and to end its strike and picketing. A true copy of the said written demand is attached hereto as Exhibit "B" and by reference made a part hereof.

XI

By reason of the acts and conduct of Local 770 and its members, plaintiff will suffer damage of not less than $5,000.00 each day, and, if these acts are permitted to continue, will be further damaged in an amount that is difficult, if not impossible, for plaintiff to ascertain.

It will be practically impossible for plaintiff to ascertain the exact amount of damage and injury which

plaintiff will sustain if defendant and its members are not enjoined from the continuance of these acts. Therefore, plaintiff cannot be fully compensated in damages and is without any plain, speedy or adequate remedy at law.

WHEREFORE, plaintiff prays judgment against defendant as follows:

1. For an Order of the Court directing and commanding defendant, its agents and representatives, to specifically perform their agreement to arbitrate and to forthwith submit the said controversy, dispute and disagreement to binding determination by an impartial Arbitrator in accordance with the terms and provisions of Article XIV of the collective bargaining contract in effect between plaintiff and defendant.

2. For a temporary restraining order, preliminary injunction and permanent injunction enjoining and restraining defendant, its agents, representatives, members and all persons acting in concert and participation with them, and each of them, from doing or causing to be done, directly or indirectly, by any manner or device whatsoever, any of the following acts or things:

(a) Picketing at, around or in the vicinity of the premises of plaintiff's retail supermarket located at 7230 Atlantic Boulevard in the City of Cudahy, County of Los Angeles, California, or any other supermarket of plaintiff.

(b) Carrying or displaying signs or placards which state in any manner that plaintiff's employees are on strike or requesting in any manner customers or potential customers not to patronize plaintiff or its supermarkets, or which, in any manner, infer that a strike

or labor dispute against or involving plaintiff is in progress.

(c) Engaging in any strike, concerted work stoppage or other economic activity at or about the premises of plaintiff's retail store located at 7230 Atlantic Boulevard in the City of Cudahy, County of Los Angeles, California, or at any other supermarket of plaintiff.

(d) Inducing, instructing, persuading or encouraging plaintiff's employees, or any of them, to engage in a strike, work stoppage, picketing or other economic activity against plaintiff or to fail or refuse to perform their work and services in a regular and normal manner for plaintiff.

(e) From stating to or informing customers or potential customers of plaintiff that plaintiff's employees are on strike or that plaintiff's store at 7230 Atlantic Boulevard in the City of Cudahy, County of Los Angeles, California, is closed or that there is no service in plaintiff's food store or from in any maner persuading, inducing or encouraging or attempting to persuade, induce or encourage plaintiff's customers or potential customers not to patronize plaintiff or to patronize plaintiff's competitors.

(f) From blocking, obstructing or impeding or attempting to block, obstruct or impede the ingress or egress of customers and potential customers to and from plaintiff's said store or at any other supermarket of plaintiff.

(g) From intimidating, inducing, persuading or encouraging or from attempting to intimidate, induce, persuade or encourage employees of suppliers of plain-

tiff to refuse to deliver goods and merchandise to plaintiff's said store.

3. For an order of this Court directing that defendant show cause, if any it has, at a time and place to be fixed by the Court, why a preliminary injunction should not issue, as prayed for herein.

4. For plaintiff's costs of suit herein.

5. For such other and further relief as may be deemed just and proper.

DATED: February 19, 1969.

* * *

Attorneys for Plaintiff.

(Verification Omitted in Printing)

EXHIBIT A.

RETAIL FOOD, BAKERY, CANDY, AND GENERAL MERCHANDISE AGREEMENT

APRIL 1, 1964—MARCH 31, 1969

between

RETAIL CLERKS UNION, LOCAL 770

1515 North Vermont Avenue
Los Angeles, California 90027

and

FOOD EMPLOYERS COUNCIL, INC.

2599 South Flower Street
Los Angeles 7, California

and

INDEPENDENT RETAIL OPERATORS

ARTICLE I

RECOGNITION OF THE UNION

A. BARGAINING UNIT.

1. The Employer recognizes the Union as the sole collective bargaining agent with respect to work, rates of pay, hours, and terms and conditions of employment for the appropriate bargaining unit composed of all employees, including employees of lessees, licensees and concessionaires (sometimes herein referred to as "leased departments"), except as limited below, who perform work within food markets, discount stores drug stores, and shoe stores presently operated and hereafter established, owned or operated by the Employer within the territorial jurisdiction of the Local Union. Food markets are defined as those types of establishments covered by collective bargaining agreements identified as Retail Food, Bakery, Candy and General Merchandise Agreement, January 1, 1959, to March 31, 1964.

2. All work or services, not specifically excluded by this Agreement, is hereby recognized as bargaining unit work. Such bargaining unit work shall neither be subcontracted nor performed by any person not a member of the bargaining unit.

3. The Employer agrees that any employees performing bargaining unit work set forth in this Agreement, within its establishments, including employees of lessees, licensees, and concessionaires shall be members of a single, overall unit, and the Employer will at all times exercise and retain full control of the terms and conditions of employment within its establishments of all such employees pursuant to this Agreement, and

shall not enter into or maintain and enforce any lease or other agreement inconsistent with the provisions hereof. The Employer's obligation with respect to operators of leased departments is limited to that set forth above, provided that the Employer shall furnish to the Union written evidence that the operator of the leased department has assumed such obligation. With respect to concessionaires, such as rack jobbers, who do not have a fixed retail place of business, the Employer shall have the Concessionaire Agreement, a sample of which is attached as Appendix B, executed by the concessionaire or his designated agent. Provided the Employer fulfulls his obligation as set forth above, the Employer shall not be liable for any breach of contract or failure of leased department to abide by the wages, hours and working conditions set forth in this Agreement. The seniority of employees of leased departments shall be separate from the seniority of employees of the Employer and of employees of other leased departments.

4. In the event that the Employer establishes a new department or creates new work or enters into any lease, license agreement, or concession agreement involving the performance of any new work in any of the stores or establishments operated by the Employer which are covered by this Agreement, for which wages are not specifically provided in this Agreement, it is agreed that, should the parties be unable to reach agreement upon wages for such work, the parties shall then submit the matter to arbitration in accordance with Article XIV of this Agreement, notwithstanding in this situation any provisions to the contrary contained therein, and shall be bound by the terms of the arbitration award.

5. In the event the signatory Employer should operate discount stores, drug stores, or shoe stores within the territorial jurisdiction of the Local Union, the appropriate terms and conditions of employment, as in existence with the other employers operating alike retail establishments, shall be immediately applied by the signatory Employer, except in those marketing areas where Local Unions 137, 899 and 1167 have not established a prevailing scale through a collective bargaining agreement. In that event, the Employer and such Local Union shall negotiate an equitable rate for said store or stores which shall remain in effect subject to the usual reopening of the contract for further negotiations, or until such time as the Union is able to establish with other competitive employers higher prevailing wage rates and conditions which shall then become applicable. Upon failure of the parties to agree on the wage rates, the rates shall be established by arbitration, again notwithstanding in this situation any provisions to the contrary contained therein.

6. It is recognized by the Employer and the Union that the bargaining unit as defined hereinabove is composed of several segments consisting of food markets, discount stores, drug stores, and shoe stores. With reference to such segments, it is agreed that negotiations shall be conducted in each segment, separate and apart from any other segment, and that any economic action undertaken by the Union or Employer shall not extend to or include. or in any way involve any other segment. It is further agreed that with reference to any segment, the Employer may join with any other employers in any collective bargaining negotiations covering such segment and may participate fully therein, in-

cluding participation in any economic action which may occur, subject to the limitations hereinabove set forth regarding non-involvement of other segments.

7. It is agreed that the provisions of Article I relating to the performance of work by persons other than employees of the Employer shall not become applicable or effective until July 1, 1964, and neither shall the provisions relating to the including of Drug, Discount and Shoe segments.

8. No restrictions or prohibitions shall be placed on the sale of any pre-packaged or pre-treated merchandise purchased from any source not directly related through ownership or management control to the Employer. It is understood, however, that the work involved in the sale of such merchandise will be performed in accordance with this Agreement.

B. FOOD MARKETS SEGMENT EXCLUSIONS.

Excluded from the segment for food markets are:

1. Persons exclusively working in a meat department, as defined by and resulting from that agreement of December 12, 1955, between the Retail Clerks International Association and the Amalgamated Meat Cutters and Butcher Workmen of North America.

2. Persons engaged exclusively in janitorial and/or maintenance work.

3. Persons presently under a collective bargaining agreement with the Culinary Workers Union, or persons employed in a complete restaurant.

4. Persons who confine their work solely to demonstration, offering of samples, assisting customers in the

selection of merchandise being demonstrated, and activities of an advertising nature.

5. Persons who build promotional displays as long as such displays do not include merchandise for selection or pick-up by customers.

6. During any three (3) consecutive days preceding the opening of a new store, or a re-opening of an old store which has been closed for remodeling, by prior notice to the Union, persons not in the bargaining unit may perform any work in such store, provided the Department of Employment is requested to furnish applicants to fill regular job vacancies pursuant to Article II.

7. The taking of inventories may be done by employees or persons who are not members of the bargaining unit and who are engaged exclusively in such work, provided that any such employees will become a part of the bargaining unit upon the signatory Union giving proof (cross-check) of its majority representation of such employees.

8. When the remodeling of an existing location occurs without such store being closed, the operating Employer shall give the members of the bargaining unit employed by him, within a reasonable area surrounding the location in question, an opportunity to perform the work required for such remodeling at the applicable contract rate. When members of the bargaining unit are not available for such work, such work may be performed by persons not in the bargaining unit.

9. Persons engaged in the inspection of merchandise displayed for sale as to its condition or status of inventory for the purpose of recommending changes to be made or services to be performed by the employees within the bargaining unit.

10. Store office employees whose work is not directly connected to checkstand operation or procedures.

11. Employees of suppliers engaged in the handling of the following categories of merchandise:

(a) Bread and cakes, when delivered by bakery drivers.

(b) Potato chips, corn chips, and similar snack items, but no other delicatessen products.

(c) Bulk and cello-wrapped candy when delivered by sales drivers.

(d) Items requiring immediate referigeration may be placed under refrigeration but not displayed.

12. Over-All Store Manager.

a. *Operation* a. Except as set forth in Paragraph b below, only one person commonly known as the over-all store manager in each of the retail stores or store of the Employer is exempt from the present Agreement. The above provisions shall not apply to any person not having the full responsibility of management over all departments operated by the owner, nor shall it apply where the owner is actively engaged on the premises in the management of said store where there are three (3) or less persons employed. Except as set forth in Paragraph (b) below, nothing in this Agreement shall in any way be construed to interfere with any work which the over-all store manager may perform.

b. *Operation* b. The Employer shall have the right at his discretion to employ in any individual store a manager and an assistant manager who shall be excluded from the bargaining unit, provided that in such instance neither of these employees shall be permitted

to perform any work whatsoever beyond the supervision or direction of the bargaining unit employees. The permanent choice of either system shall be made by the employer in writing to the Union no later than sixty (60) days after the effective date of this Agreement, or sixty (60) days after the opening of any new store. The choice of either (a) or (b) operation as hereinabove defined may be altered on the annual anniversary date of this Agreement. Operation (b) shall not apply to any store with less than ten (10) bargaining unit employees, excluding clerk's helpers.

c. Concessionaires, such as rack jobbers, who do not have a fixed retail place of business, and who employ traveling personnel who perform bargaining unit work, shall not be entitled to (a) and (b) above. However, supervisory employees of such concessionaires shall be excluded from the bargaining unit, provided that such supervisors shall not be permitted to perform any bargaining unit work. The operator of any concession not having a fixed retail place of business, such as rack jobbers, shall not be permitted to perform any bargaining unit work unless such operator employ one or more employees who perform bargaining unit work, or unless he achieves employee status.

C. DISCOUNT STORES SEGMENT EXCLUSIONS.

Exclusions from the bargaining unit with respect to employees employed in discount stores are as set forth in the appropriate agreement.

D. DRUG STORES (OR DEPARTMENTS) SEGMENT EXCLUSIONS.

Exclusions from the bargaining unit with respect to employees employed in drug stores (or departments) are as set forth in the appropriate agreement.

E. SHOE STORES (OR DEPARTMENTS) SEGMENT EXCLUSIONS.

Exclusions from the bargaining unit with respect to employees employed in shoe stores (or departments) are as set forth in the appropriate agreement.

F. CATEGORIES OF EMPLOYEES—FOOD MARKET SEGMENT.

There shall be estabished by this Agreement four (4) categories of employees to be identified as follows:

1. *Food or Grocery Clerk.* Subject to the exclusions from the bargaining unit described above, a Food or Grocery Clerk is an employee who handles all foodstuffs, including liquor and other beverages, nursery items behind the checkstands, all household paper goods, insecticides and all household cleaning and laundry supplies. Store office employees whose work is directly connected to checkstand procedures or operations are also included in this category, as are traveling clerks of concessionaires who service health and beauty aids and houseware items or similar line or lines of merchandise.

2. *General Merchandise Clerk.* Subject to the exclusions from the bargaining unit described above, a General Merchandise Clerk is one who handles any merchandise other than that included in the definition of Food and Grocery Clerk, provided, however, that the General Merchandise Clerk also includes one who handles bakery goods in a bakery department as defined in Article XXII, bulk or cello-packed candy, tobacco (except where the tobacco is displayed at the checkstand and the liquor departments), and service delicatessen and take-out food departments as set forth in Article VI, Paragraph S-3.

3. *Clerk's Helper.* A Clerk's Helper is an employee whose duties do not include any of the work of a regular clerk. Clerk's Helpers may perform cleanup work. Clerk's Helpers may keep the checkstands stocked with supplies, such supplies not to include merchandise offered for sale. Clerk's Helpers may handle merchandise after it has become the property of the customer, and may also assist the checker or cashier in removing merchandise from the baskets or pushcarts and may return carrybacks to the shelves. Clerk's Helpers may collect and line up pushcarts or baskets and return them to the market, and may keep the parking lot orderly and free from refuse. Clerk's Helpers may carry empty bottles to a collection point, sort, and account for same, and may also carry refuse to a point of disposal. Clerk's Helpers may hang signs. The work to be performed by Clerk's Helpers is limited to the duties set forth in this paragraph.

4. *Snack Bar and Take-Out Food Department Employees.* Snack Bar and Take-Out Food Department Employees are employees whose duties include solely the work set forth in Article VI, Paragraphs S-1, 2 and 6.

G. UNION JURISDICTION.

During the life of this Agreement, the Union will not engage in jurisdictional disputes on the premises of the Employer's places of business.

[Articles II Through XIII Omitted]

ARTICLE XIV

ADJUSTMENT AND ARBITRATION

A. CONTROVERSY, DISPUTE OR DISAGREEMENT.

Any and all matters of controversy, dispute or disagreement of any kind or character existing between the parties and arising out of or in any way involving the interpretation or application of the terms of this Agreement, except as may be otherwise provided in Paragraph D of this Article, shall be settled and resolved by the procedures and in the manner hereinafter set forth.

B. ADJUSTMENT PROCEDURE.

1. *Store Level.* The Union through its representatives shall attempt to settle or resolve any such matter with the appropriate store supervisor or person designated by the Employer in the manner indicated in Article X of this Agreement.

2. *Meeting of Representatives.* Upon receipt of a written notice from either party, the representatives of the Employer and the representatives of the Union shall meet within a calendar week and attempt to settle or resolve the matter.

3. *Food Employers Council, Inc.* The Union hereby recognizes the Food Employers Council, Inc. as the authorized representative of its members in matters pertaining to the negotiation and administration of this Agreement. In the event of a dispute, it shall be the duty of the Employer to notify the Food Employers Council, Inc. of the existing dispute if said Employer desires said Food Employers Council, Inc. to represent it in the dispute. Should a grievance or dispute be

settled between the Union and any Employer signatory to this Agreement without the participation of the Food Employers Council, Inc. and if in such settlement, an interpretation of any language or phrase of this Agreement is involved in order that such settlement be reached, the Union shall, within ten (10) days of such settlement notify Food Employers Council, Inc., in writing of the dispute, the language or the phrase interpreted, the settlement reached, and the date of such settlement. Should the Union fail to notify the Food Employers Council, Inc., as set forth above, the fact of settlement and the interpretation of the language or phrase of the Agreement involved in the settlement shall not be used in evidence for any purpose whatsoever. No such settlement or interpretation shall be binding upon the Food Employers Council, Inc. or its members unless the Council or its members thereof participated in arriving at such settlement or interpretation.

C. ARBITRATION.

1. Any matter not satisfactorily settled or resolved in Paragraph B hereinabove shall be submitted to arbitration for final determination upon written demand of either party. The written demand for arbitration may be made at any time after the expiration of fifteen (15) days from the date of notice, submitted the matter under Paragraph B, subsection 2, hereinabove, to the meeting of representatives.

2. The representatives of the Union and the representatives of the Employeer shall meet for the purpose of selecting an impartial arbitrator within the ten (10) day period following the demand for arbitration. If no

agreement upon an arbitrator is reached during this period, either party may then request a list of fifteen (15) persons qualified to act as arbitrators under this Agreement, from the Federal Mediation and Conciliation Service and upon receipt of this list the parties shall immediately thereafter select the arbitrator by alternately striking names from the list until the last name remains. The parties shall draw lots to determine who shall make the first deletion from the list.

3. Should either party desire, a board of arbitration shall be convened in lieu of a single arbitrator, consisting of an equal number of arbitrators appointed by each party (not to exceed two appointed by each) and the impartial arbitrator who shall be chairman. The board shall hear and determine the matter by majority vote of the members of the board.

4. The arbitrator or board of arbitration shall be empowered to hear and determine the matter in question and the determination shall be final and binding upon the parties, subject only to their rights under law. The hearings shall be held within thirty (30) days after the selection of the arbitrator, or board, which shall have the power to decide the date or dates upon which the arbitration is to be held if agreement cannot be reached by the parties.

D. POWERS, LIMITATIONS AND RESERVATIONS.

1. Arbitrator. The arbitrator or board of arbitration shall not have the authority to decide questions involving the jurisdiction of any local, or of the International, or which may in any way affect or change the Union Security clause, nor shall the arbitrator or board of arbitration have the authority to effect a

change in, modify, or amend any of the provisions of this Agreement, or to make decisions on provisions covering wages or working conditions to be incorporated either in a new agreement or any subsequent annual agreement. If a question of the arbitrability of an issue is raised by either party, such question shall be determined in the first instance by the arbitrator or board. Neither party to this Agreement shall refuse to proceed to arbitration upon the grounds that the matter in question is not arbitrable.

2. Work Stoppages. Matters subject to the procedures of this Article shall be settled and resolved in the manner provided herein. During the term of this Agreement, there shall be no cessation or stoppage of work, lock-out, picketing or boycotts, except that this limitation shall not be binding upon either party hereto if the other party refuses to perform any obligation under this Article or refuses or fails to abide by, accept or perform a decision or award of an arbitrator or board.

3. Wage Claims. In the case of a direct wage claim or a claim for contributions to employee benefit plans which does not involve an interpretation of any of the provisions of this Agreement, either party may submit such claim for settlement to either the grievance procedure provided for herein or to any other tribunal or agency which is authorized and empowered to effect such a settlement.

E. STATUS QUO.

During the period of adjustment or arbitration as provided in this Article, the conditions in effect at the time of receipt of written notice, specified in Para-

graph C above, shall continue in effect pending final decision.

F. EXPENSES.

The expenses of the arbitrator shall be borne equally by both the Employer and the Union.

G. TIME LIMITS.

The time limits set forth above may be extended by mutual agreement between the parties.

H. REPORTING DISCREPANCIES.

It shall be the responsibility of the employee to report any claimed discrepancy to the Union promptly upon discovery, and it shall then become the responsibility of the Union to notify the Employer promptly of such claimed discrepancy. In any event, all complaints must be filed in writing within thirty (30) days after the matter in dispute or disagreement is first reported to the Union. Complaints not filed within the limits herein specified shall be deemed null and void.

[Articles XV Through XXVI Omitted]

EXHIBIT "B".

WESTERN UNION
TELEGRAM

FEBRUARY 18, 1969

JOSEPH T. DeSILVA, EXECUTIVE SECRETARY
RETAIL CLERKS UNION LOCAL 770
1515 N. VERMONT AVENUE
LOS ANGELES, CALIFORNIA 90027

RE: BOYS MARKET. TODAY, YOUR UNION INDUCED A STRIKE AND WORK STOPPAGE AT THE BOYS MARKET AT FLORENCE AND ATLANTIC IN BELL GARDENS BECAUSE OF A DISPUTE WHICH YOUR UNION RAISED CONCERNING THE STOCKING OF CERTAIN FROZEN FOOD CASES IN THE STORE, AND AT THIS TIME YOU HAVE THREATENED TO CAUSE SIMILAR WORK STOPPAGES AT OTHER BOYS MARKETS. THIS DISPUTE INVOLVES THE INTERPRETATION AND APPLICATION OF THE LABOR AGREEMENT, AND THE EMPLOYER CONTENDS THAT ITS ACTION IS ENTIRELY PROPER AND APPROPRIATE UNDER THAT AGREEMENT. YOUR UNION APPARENTLY CONTENDS THAT THE EMPLOYER'S CONDUCT IS A BREACH OF THE AGREEMENT. AS YOU WELL KNOW, THE LABOR AGREEMENT REQUIRES THAT ALL CONTROVERSIES, DISPUTES AND DISAGREEMENTS INVOLVING THE INTERPRETATION OR APPLICATION OF THE AGREEMENT BE RESOLVED THROUGH ARBITRATION. ARTICLE XIV D2 SPECIFICALLY PRO-

HIBITS STRIKES, WORK STOPPAGES AND PICKETING. YOUR ACTION IS A MOST SERIOUS BREACH OF THE LABOR AGREEMENT, AND YOU WILL BE HELD LIABLE FOR ALL DAMAGES TO THE FULLEST EXTENT PROVIDED BY LAW. THIS IS TO DEMAND ON BEHALF OF BOYS MARKETS THAT YOU IMMEDIATELY CEASE YOUR ILLEGAL STRIKE AND WORK STOPPAGE AND SUBMIT THE DISPUTE TO THE GRIEVANCE AND ARBITRATION PROCEDURE PROVIDED FOR IN ARTICLE XIV. THE ADJUSTMENT PROCEDURE OF ARTICLE XIV IS HEREBY INVOKED, AND YOU ARE NOTIFIED THAT REPRESENTATIVES OF THE EMPLOYER STAND READY TO MEET IMMEDIATELY WITH RESPECT TO THIS MATTER.

ROBERT K. FOX, PRESIDENT
FOOD EMPLOYERS COUNCIL, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

(Title Omitted in Printing)

No. 948323

Declaration of Vern Heaps.

State of California, County of Los Angeles—ss.

I, VERN HEAPS, say that:

I am employed by The Boys Markets, Inc. in the capacity of Frozen Food Supervisor. On Tuesday, February 18, 1969, I was performing my duties at the Boys Markets' supermarket located at 7230 Atlantic Boulevard in the City of Cudahy, County of Los Angeles, State of California, at the intersection of Florence Avenue and Atlantic Boulevard. At this time, with a crew of five other men, I was revamping the merchandise in four frozen food cases located along one of the aisles of this store. We were moving frozen meat and fish products from one end of these cases to the other end and relocating various other types of products within the cases. This was a clean-up program for the purpose of properly displaying the merchandise in the freezer cases and removing certain merchandise which had not been sold within the proper time.

At approximately 10:00 A.M., I noticed two men come into the store. Although I do not know their names, I recognized these men as business agents of Retail Clerks Union Local 770. After a short period, they left the store. Later in the day, during the lunch

hour, thirteen individuals came into the store. I recognized one of them as Mr. Sam Matelson, who is the President of Retail Clerks Union Local 770. I asked Mr. Matelson if I could help him. He responded by asking to see my union card, and I informed him that I did not have one and that I was the Frozen Food Supervisor. Mr. Matelson then stated, "We are from the Union, and the rest of the business agents are on stand-by." He then wanted to know where the rest of my group were, and I informed him that they were at lunch. Mr. Matelson then told me to have them stay around when they returned from lunch, because "We've got something going here".

Later, Mr. Matelson told Mr. Robert Slater, the Store Manager of this store, that he didn't like what was going on in the store, and that we should not be stocking the merchandise in the cases.

Following this conversation, the union representatives made a telephone call to the union office. After the lapse of some period of time, a telephone call came from the union. Immediately after this telephone call, Mr. Matelson and the other representatives informed Mr. Slater that the union's position was that unless we removed all of the merchandise from the four frozen food cases, took it back to the frozen food freezer in the back of the store and then had the cases restocked by retail clerks, the union would pull the crew and commence picketing the store. He was informed that the Company would not agree to these conditions. Immedi-

ately thereafter, Mr. Matelson and the union representatives went through the store and told all of the retail clerks to lock up and leave the store. At that time, there were twelve employees on duty in the grocery department, produce department, delicatessen, general merchandise department and warehouse who were members of the Retail Clerks Union. All twelve of these employees immediately left their employment and went outside into the parking lot. This occurred at approximately 3:15 P.M. in the afternoon on Tuesday, February 18, 1969.

The business agents for Local 770 stationed themselves at various locations on the sidewalk immediately in front of the store and commenced telling customers who were attempting to enter the store that the store was "closed" or that there was "no service" in the store. At the same time, I observed seven of these business agents picketing the store along the sidewalk and at the entrance to the automobile parking lot. These pickets were carrying signs which read as follows:

"LOCAL 770
THIS STORE ON STRIKE
PLEASE RESPECT OUR PICKET LINES"

On several occasions, the representatives of Local 770 demanded that as a condition of ending the strike the retail clerks would have to totally strip all four frozen food cases, take all of the merchandise in these four cases back to the freezer and then entirely restock the cases again. Later, we were informed that we could do this on a case-by-case basis as to each of the four cases. On this day, the store had available and on duty only two clerks who could perform this task. Because

of the size of the frozen food display cases involved and the amount of merchandise that would have to be moved out of the cases, back to the freezer and then returned and restocked in the cases, it would have taken us twelve hours to perform this work.

Because of the picketing and the statements made by the business agents that the store was closed or that there was no service in the store, the store suffered substantial loss of business. Very few customers came into the store, and for a considerable period of time, I observed that we had no more than one or two customers in the entire store.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on February 19, 1969, at Los Angeles, California.

/s/ Vern Heaps
VERN HEAPS

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

(Title Omitted in Printing)

No. 948323

Order to Show Cause and Temporary Restraining Order.

On reading the verified Complaint on file in this action and the supporting declaration and the memorandum of points and authorities, it appears to the satisfaction of the Court that this is a proper case for granting an Order to Show Cause and Temporary Restraining Order, and that unless a Temporary Restraining Order is granted as prayed for, plaintiff will suffer great and irreparable injury before the matter can be heard on notice. Good cause appearing:

IT IS ORDERED that defendant shall appear before this Court in Department 65 thereof on the 5th day of March, 1969, at the hour of 9:30 o'clock A.M., then and there to show cause, if any, why defendant, its officers, agents, representatives, members, employees, attorneys, and each of them, and all persons acting in aid or in concert with defendant, should not be enjoined and restrained, pending final determination of this action, from doing or attempting to do, or threatening to do, and from causing to be done, either directly or indirectly, by any means, method or device whatsoever, any and all of the following acts:

(a) Picketing at, around or in the vicinity of the premises of plaintiff's retail supermarket located at 7230 Atlantic Boulevard in the City of Cudahy, County of

Los Angeles, California, or any other supermarket of plaintiff.

(b) Carrying or displaying signs or placards which state in any manner that plaintiffs employees are on strike or requesting in any manner customers or potential customers not to patronize plaintiff or its supermarkets, or which, in any manner, infer that a strike or labor dispute against or involving plaintiff is in progress.

(c) Engaging in any strike, concerted work stoppage or other economic activity at or about the premises of plaintiff's retail store located at 7230 Atlantic Boulevard in the City of Cudahy, County of Los Angeles, California, or at any other supermarket of plaintiff.

(d) Inducing, instructing, persuading or encouraging plaintiff's employees, or any of them, to engage in a strike, work stoppage, picketing or other economic activity against plaintiff or to fail or refuse to perform their work and services in a regular and normal manner for plaintiff.

(e) From stating to or informing customers or potential customers of plaintiff that plaintiff's employees are on strike or that plaintiff's store at 7230 Atlantic Boulevard in Cudahy, California, is closed or that there is no service in plaintiff's food store or from in any manner persuading, inducing or encouraging or attempting to persuade, induce or encourage plaintiff's customers or potential customers not to patronize plaintiff or to patronize plaintiff's competitors.

(f) From blocking, obstructing or impeding or attempting to block, obstruct or impede the ingress or

egress of customers and potential customers to and from plaintiff's said store or at any other supermarket of plaintiff.

(g) From intimidating, inducing, persuading or encouraging or attempting to intimidate, induce, persuade or encourage employees of suppliers of plaintiff to refuse to deliver goods and merchandise to plaintiff's said store.

IT IS FURTHER ORDERED that defendant, its officers, agents, representatives, members, employees, attorneys, and each of them, and all persons acting in aid or in concert with defendant, be and they hereby are enjoined and restrained, pending the hearing on this Order to Show Cause, from doing or attempting to do, or threatening to do, and from causing to be done, either directly or indirectly, by any means, method or device whatsoever, any and all of the following acts in connection with, related to or in furtherance of a strike or work stoppage against plaintiff involving the pending dispute as to the stocking of frozen foods:

(a) Picketing at, around or in the vicinity of the premises of plaintiff's retail supermarket located at 7230 Atlantic Boulevard in the City of Cudahy, County of Los Angeles, California, or any other supermarket of plaintiff.

(b) Carrying or dispaying signs or placards which state in any manner that plaintiff's employees are on strike or requesting in any manner customers or potential customers not to patronize plaintiff or its super-

markets, or which, in any manner, infer that a strike or labor dispute against or involving plaintiff is in progress.

(c) Engaging in any strike, concerted work stoppage or other economic activity at or about the premises of plaintiff's retail store located at 7230 Atlantic Boulevard in the City of Cudahy, County of Los Angeles, California, or at any other supermarket of plaintiff.

(d) Inducing, instructing, persuading or encouraging plaintiff's employees, or any of them, to engage in a strike, work stoppage, picketing or other economic activity against plaintiff or to fail or refuse to perform their work and services in a regular and normal manner for plaintiff.

(e) From stating to or informing customers or potential customers of plaintiff that plaintiff's employees are on strike or that plaintiff's store at 7230 Atlantic Boulevard in Cudahy, California, is closed or that there is no service in plaintiff's food store or from in any manner persuading, inducing or encouraging or attempting to persuade, induce or encourage plaintiff's customers or potential customers not to patronize plaintiff or to patronize plaintiff's competitors.

(f) From blocking, obstructing or impeding or attempting to block, obstruct or impede the ingress or egress of customers and potential customers to and from plaintiff's said store or at any other supermarket of plaintiff.

(g) From intimidating, inducing persuading or encouraging or attempting to intimidate, induce, persuade or encourage employees of suppliers of plaintiff to refuse to deliver goods and merchandise to plaintiff's said store.

IT IS FURTHER ORDERED that a copy of the Summons and Complaint, declaration and points and authorities, together with a copy of this Order to Show Cause and Temporary Restraining Order, be served on the defendant not later than the 26 day of February, 1969.

DATED: February 19th, 1969.

$1,000.00 Bond
Corporate Surety

/s/ Richard Schauer
JUDGE

(Bond Omitted in Printing)

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

(Title Omitted in Printing)

No. 948 323

Notice of Filing Petition and Bond for Removal.

TO: PLAINTIFF, THE BOYS MARKETS, INC., A CALIFORNIA CORPORATION, AND TO JOSEPH M. McLAUGHLIN, ITS ATTORNEY:

PLEASE TAKE NOTICE that defendant, Retail Clerks Union, Local 770, did on February 20, 1969, file in the United States District Court, Central District of California, its Petition for Removal of the above-captioned Superior Court case from the Superior Court of the State of California for the County of Los Angeles, to the said United States District Court, Central District of California, together with Bond for Removal, true copies of which are annexed to a copy of this Notice served upon you.

Dated: February 21, 1969.

* * *

Attorneys for Defendant

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

The Boys Markets, Inc., a California corporation, Plaintiff, vs. Retail Clerks Union, Local 770, an unincorporated association, Defendant. No. .....

Petition for Removal Together With Bond for Removal.

TO: THE HONORABLE UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA:

Defendant herein, Retail Clerks Union, Local 770 (hereinafter sometimes referred to as the "Union"), as and for its verified Petition for Removal, respectfully shows to this Honorable Court that:

1. On the 19th day of February, 1969, an action was filed in the Superior Court of the State of California in and for the County of Los Angeles, entitled as in the annexed copy of Complaint for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction and for Specific Performance of Agreement to Arbitrate (hereinafter sometimes referred to as the "Complaint," marked Exhibit "A" and made a part hereof by reference), by service upon defendant of said Complaint. On the same day, plaintiff also filed an Order to Show Cause and Temporary Restraining Order.

2. Defendant herein, Retail Clerks Union, Local 770, affiliated with Retail Clerks International Association, AFL-CIO, is a labor organization as defined in the Labor-Management Relations Act of 1947, 61 Stat. 161, 29 U.S.C., Section 142, and is the defendant

in the aforesaid civil action in the state court. At all times herein relevant, the Union was an unincorporated association in which employees participate and which has existed for the purpose of dealing with employers concerning grievances and terms and conditions of employment and has represented employees in an industry affecting commerce within the meaning of Title 29, U.S.C., §185(a). The plaintiff herein, The Boys Markets, Inc. (hereinafter sometimes referred to as the "Employer") has in the past and does now purchase or receive goods and materials from outside the State of California in substantial dollar amounts, sell products to customers outside the State of California in substantial dollar amounts, and engage as an employer in an industry affecting commerce. At all times relevant herein, there existed and does now exist a collective bargaining agreement between the Union and the Employer.

3. Said action is a civil action of which this Court has original jurisdiction under Title 29, U.S.C., §185-(a), (Section 301 of the Labor-Management Relations Act) and is one which defendant is entitled to remove to this Court pursuant to Title 28, U.S.C., §1441, and Title 29, U.S.C., §184(a), in that said action involves plaintiff engaged in interstate commerce within the meaning of the National Labor Relations Act, as Amended, is based upon a collective bargaining agreement between plaintiff and defendant and the Complaint alleges a violation of the collective bargaining agreement by defendant.

4. The above representations are sufficient to support defendant's Petition for Removal since the Complaint filed in the State Court presents a claim arising

under the "laws of the United States" within the meaning of the removal statute, 28 U.S.C., §1441(b) and since the suit is within the "original jurisdiction" of the District Court within the meaning of 28 U.S.C., §1441(a) and (b). The United States District Court has original jurisdiction of a suit grounded in a breach of contract between an employer and a labor organization (29 U.S.C., §185(a)). All the jurisdictional elements under 29 U.S.C., §185(a) are present if the suit is between an employer engaged in an industry affecting interstate commerce, and a union, alleging a breach of a collective bargaining agreement. See *Food Fair Stores, Inc. v. Retail Clerks District Council No. 11,* 229 F.Supp. 123 (D.C. E.Pa. 1964). The State Court action for injunction for the alleged violation of the no-strike clause in the collective bargaining contract is removable to the Federal District notwithstanding the relief that may be granted in view of the Norris-LaGuardia Act. *Avco Corp. v. Aero Lodge 735, IAM,* 390 U.S. 557 (1968), 67 LRRM 2881.

Whether a suit is for violation of a labor contract within 29 U.S.C., §185(a) is determined with reference to the plaintiff's claim. *Minkoff v. Budget Dress Corp.,* 180 F.Supp. 818 (S.D.N.Y. 1960). But it is permissible to look to the removal petition to determine whether certain of the jurisdictional requirements are met. *Old Dutch Farms, Inc. v. Milk Drivers and Dairy Employees Union, Local 584,* 222 F.Supp. 125 (E.D.N.Y. 1963); *Minkoff v. Scranton Frocks, Inc.,* 172 F.Supp. 870 (S.D.N.Y. 1959).

5. Exhibit "A" which has been annexed and which consists of the copy of Complaint filed in the Los Angeles Superior Court is the initial pleading setting forth the basis of plaintiff's suit. The defendant first received a copy of said initial pleading on February 19, 1969. A copy of the Order to Show Cause and Temporary Restraining Order is attached hereto as Exhibit "B" and made a part hereof by reference. A copy of the Points and Authorities, a copy of the Declaration of Vern Heaps, a copy of the collective bargaining agreement marked Exhibit A and a copy of a telegram marked Exhibit B of Employer in support of the aforesaid Complaint are attached hereto as Exhibits "C," "D," "E" and "F," respectively, and made a part hereof by this reference. The aforesaid documents constitute all of the process, pleadings and orders served upon defendant in said action.

6. This removal petition has been timely filed within twenty days after the receipt by the defendant of a copy of the initial pleading as required by 28 U.S.C., §1446(b).

7. Defendant files herewith a bond with good and sufficient surety in the penal sum of Five Hundred Dollars ($500.00) as provided by Title 28, U.S.C., §1446(d), conditioned that defendant will pay the costs and disbursements incurred by reason of this removal proceeding should it be determined that the action was not removable or was improperly removed.

WHEREFORE, defendant prays that the above action now pending against it in the Superior Court of the State of California for the County of Los Angeles, No. 948 323, hereby be removed from said State Court to this Court.

Dated: February 20, 1969.

* * *

Attorneys for Defendant

(Verification Omitted in Printing)

(Bond on Removal Omitted in Printing)

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Title Omitted in Printing)

No. 69-337-CC

Notice of Motion and Motion to Quash Superior Court Temporary Restraining Order.

TO: PLAINTIFF, THE BOYS MARKETS, INC., A CALIFORNIA CORPORATION, AND TO JOSEPH M. McLAUGHLIN, ITS ATTORNEY:

PLEASE TAKE NOTICE that on the 10th day of March, 1969, at 10:00 A.M., or as soon thereafter as counsel can be heard, defendant will move the above-entitled Court, at Courtroom No. 2, United States Courthouse, 312 North Spring Street, Los Angeles, California, for an order quashing that Temporary Restraining Order entered in the Superior Court of the State of California for the County of Los Angeles on February 19, 1969 in Case No. 948 323, based on the entire record in this case and the Points and Authorities filed herewith.

Dated: February 24, 1969.

* * *

Attorneys for Defendant

(Affidavit of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Title Omitted in Printing)

No. 69-337-CC

Memorandum of Points and Authorities in Support of Motion to Quash Superior Court Temporary Restraining Order and in Support of Order Shortening Time.

POINT I

The United States District Court has original jurisdiction of this action since the Complaint is grounded upon an alleged breach of contract between an employer engaged in interstate commerce and a labor organization.

§301 of the Labor-Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C., §185;

Avco Corp. v. Aero Lodge 735, IAM, 390 U.S. 557 (1968), 67 LRRM 2881.

POINT II

A federal court is barred from issuing an injunction in a labor dispute and must dissolve any state injunction issued by a state court prior to the removal of such case.

§4, Norris-LaGuardia Act, 29 U.S.C., §104;

Sinclair Refining Co. v. Atkinson, 370 U.S. 212, 82 S.Ct. 1328, 50 LRRM 2420 (1962);

Avco Corp. v. Aero Lodge 735, IAM, 376 F.2d 337, (6th Cir. 1967), 65 LRRM 2193 (affirmed without reaching this point in 390 U.S. 557).

POINT III

The court may, in its discretion, for good cause prescribe a shorter time for service of notice and hearing.

U. S. District Court, Central District of California, Local Rule 3(c).

Dated: February 24, 1969.

Respectfully submitted,

* * *

Attorneys for Defendant

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Title Omitted in Printing)

No. 69-337-CC

Motion for Order Compelling Arbitration; for Order Requiring Specific Performance of Agreement to Arbitrate; and Application for Preliminary Injunction.

Plaintiff herein, The Boys Markets, Inc., moves the Court for an order compelling defendant, Retail Clerks Union Local 770, to arbitrate the existing controversy, dispute and disagreement arising out of and involving the interpretation and application of their collective bargaining agreement, as set forth with particularity in plaintiff's Complaint on file herein, in accordance with the grievance and arbitration procedures as contained in Article XIV of the collective bargaining agreement between plaintiff and defendant.

Plaintiff further moves the Court for an order commanding and requiring defendant to specifically perform in connection with the said dispute each and every term and provision contained in Article XIV of the said collective bargaining agreement between plaintiff and defendant.

Plaintiff further moves the Court and makes application thereto for a preliminary injunction restraining and enjoining defendant pendente lite from doing or performing, or attempting to do or perform, any or all of the acts and things which defendant was restrained

and enjoined from doing or performing, or attempting to do or perform, by the Temporary Restraining Order heretofore issued by the Superior Court of the State of California.

Said motions, each and all, will be made upon the grounds that plaintiff and defendant are engaged in a controversy, dispute or disagreement arising out of and involving the intepretation or application of the terms and provisions of their said contract as relate to the performance of certain work within plaintiff's store; that the said contract in existence between plaintiff and defendant requires that controversies, disputes or disagreements of the kind or character now existing between the parties be submitted to an impartial arbitrator for binding determination; that defendant, under and pursuant to the terms and provisions of said contract, promised, covenanted and agreed that the Union and its members, employees of plaintiff, would not engage in any strike, work stoppage or other concerted economic activity against plaintiff upon any controversy, dispute or disagreement which was required by said contract to be submitted to arbitration; and that, in substantial and material breach and violation of the terms and provisions of said collective bargaining agreement, defendant engaged in a strike against plaintiff and induced, encouraged and persuaded plaintiff's employees to cease performing their work for plaintiff in furtherance of said strike.

Said motion will be based upon this written motion and notice of hearing thereon, plaintiff's verified

Complaint, declaration in support thereof, memorandum of points and authorities filed in the State Court, supplemental memorandum of points and authorities filed herewith, and the papers, files and records in this proceeding. Said motion will be further based upon the jurisdiction of this Court under and pursuant to the provisions of Title 29, U.S.C., §185, and Title 28, U.S.C., §1441.

DATED: February 26, 1969.

* * *

Attorneys for Plaintiff.

NOTICE OF HEARING ON MOTIONS

TO DEFENDANT, RETAIL CLERKS UNION LOCAL 770, AND TO ARNOLD, SMITH & SCHWARTZ, ITS ATTORNEYS:

PLEASE TAKE NOTICE that on the 10th day of March, 1969, at the hour of 10:00 o'clock A.M., or as soon thereafter as counsel can be heard, plaintiff will bring the foregoing motions on for hearing before the above-entitled Court, the Honorable Charles H. Carr, District Judge Presiding, at Courtroom No. 2, United States Courthouse, 312 N. Spring Street, Los Angeles, California.

DATED: February 26, 1969.

* * *

Attorneys for Plaintiff.

(Affidavit of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Title Omitted in Printing)

No. 69-337-CC

Supplemental Memorandum of Points and Authorities in Support of Motions to Compel Arbitration; for Specific Performance; and for Preliminary Injunction.

I

The Federal Courts Have Jurisdiction To Compel A Labor Organization To Arbitrate Disputes Arising Under Labor Agreements.

The United States Supreme Court has held that Section 301 of the Labor-Management Relations Act of 1947, as amended (29 U.S.C. §185), gives Federal District Courts jurisdiction to compel compliance with provisions of collective bargaining contracts between employers and unions which require arbitration of disputes arising out of such agreements and also furnishes a body of federal substantive law for the enforcement of such contracts. The Norris-LaGuardia Act (29 U.S.C. §101, et seq.) does not prevent the granting of such relief.

Textile Workers Union of America v. Lincoln Mills of Alabama, 353 U.S. 448, 40 LRRM 2113.

General Electric Co. v. Local 205, United Electrical, Radio and Machine Workers of America, 353 U.S. 547, 40 LRRM 2119.

"The Congress, however, has by § 301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluc-

tant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit. Yet, to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or agreed to give the arbitrator power to make the award he made. An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582, 46 LRRM 2416.

"The collective agreement calls for the submission of grievances in the categories which it described irrespective of whether a court may deem them to be meritorious. In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve. See Lewis v. Benedict Coal Corp., 361 U.S. 459, 468, 45 LRRM 2719. The function of the court is very limited when the parties have agreed to submit all questions of

contract interpretation to the arbitrator. It is then confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.

"The courts therefore have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those the court will deem meritorious. The processing of even frivolous claims may have therapeutic values which those who are not a part of the plant environment may be quite unaware."

United Steelworkers of America v. American Manufacturing Company, 363 U.S. 564, 567-568, 46 LRRM 2414.

II

Federal Courts Have Power To Require Specific Performance Of Contracts Between Employers And Unions.

The provisions of Section 301 of the Labor-Management Relations Act of 1947 establish substantive law to apply in actions under this Section. The Courts are required thereunder to fashion the federal law from the policies of our national labor laws and to fash-

ion remedies that will effectuate that policy. The range of judicial inventiveness must be determined by the nature of the problem.

Textile Workers Etc. v. Lincoln Mills of Alabama, supra.

Under Section 301, then, the Courts have the power to require specific performance by a defaulting party of the terms and provisions of the collective bargaining agreement.

Retail Clerks Union Local 1222 v. Alfred M. Lewis, Inc., (CA-9 1964), 327 Fed. 2d 442;

Truck Drivers, Oil Drivers, Filling Station and Platform Workers Union Local 705 v. Novak, (DC-ND Ill. 1960), 47 LRRM 2444.

III

The Norris-LaGuardia Act Is To Be Construed As One Of A Number Of Interlacing Statutes Establishing A National Labor Policy And Cannot Be Read In Isolation.

The Norris-LaGuardia Act, 29 U.S.C. §101-115 was enacted in 1932. The Act states that no Court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, with certain stated exceptions not pertinent here. The statute was a Congressional reaction to the use and, sometimes, abuse of the injunctive process in labor relations during the first three decades or so of this century. At the time, it was felt that the labor movement required governmental assistance in order to grow and increase its strength so as to permit meaningful collective bargaining between employers and unions with a parity of bargaining power.

This statute was followed in 1935 by the enactment of the National Labor Relations Act, popularly referred to as the Wagner Act. The Norris-LaGuardia Act declared the public policy of the United States that employees have full freedom of association and designation of representatives of their own choosing. (29 U.S.C. §102). This policy was reaffirmed by the National Labor Relations Act which outlawed certain types of employer conduct and which was designed to enhance the ability of labor unions to obtain employer recognition and bargaining status.

In 1941, the Supreme Court considered the impact of the Norris-LaGuardia Act upon certain anti-trust laws of the United States. The question presented was whether the use of conventional, peaceful activities by a union in controversy with another union over certain jobs was a violation of the Sherman Act. The Government had indicted four officers of the Carpenters Union alleging a criminal combination and conspiracy in violation of the anti-trust laws. In determining this issue, Mr. Justice Frankfurter, writing for the Court, stated, "* * * whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct." The Court posed the question as follows:

> "Were then the acts charged against the defendants prohibited or permitted by these three interlacing statutes?"

United States v. Hutcheson, 312 U.S. 231, 232; 61 S. Ct. 466.

The Court characterized the statutes mentioned as practically and historically a series of enactments touching "* * * one of the most sensitive national problems." The Court declared:

> "Such legislation must not be read in a spirit of mutilating narrowness. On matters far less vital and far less interrelated we have had occasion to point out the importance of giving 'hospitable scope' to Congressional purpose even when meticulous words are lacking. Keifer & Keifer v. Reconstruction Finance Corporation, 306 U.S. 381, 391, 59 S.Ct. 516, 519, 83 L.Ed. 784, and authorities there cited. The appropriate way to read legislation in a situation like the one before us, was indicated by Mr. Justice Holmes on circuit: 'A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.' Johnson v. United States, 1 Cir., 163 F. 30, 32, 18 L.R.A., N.S., 1194."

United States v. Hutcheson, 312 U.S. 235, 61 S. Ct. 467, 468.

Applying the foregoing principles, the Court held that the acts complained of could not be considered as violative of the anti-trust laws. At the time *Hutcheson* was decided, bearing in mind the then existing labor legislation, there could be no doubt but that Norris-LaGuardia prohibited Federal Courts from issuing injunctions in all "labor disputes". However, in 1947, the Congress enacted the Labor Management Relations Act of 1947 (29 U.S.C. §141). This statute reflected a significant change in legislative emphasis. Whereas Norris-LaGuardia and the Wagner Act had been designed to promote union strength, the 1947 Act was primarily for the purpose of limiting union conduct and restricting a force which, many felt, had grown too strong since the early 1930s. The statute contained many such specific restrictions.

Section 301 of that statute (29 U.S.C. §185) provided for the first time that, among other things, suits for violation of contracts between employers and unions could be brought in the Federal Courts. Section 301(a) reads:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commence as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Section 301 was subjected to the scrutiny of the Supreme Court in *Ass'n Of Westinghouse Salaried Employees v. Westinghouse Electric Corp.* (1955), 348

U.S. 437, 75 S. Ct. 489. This was an action by a labor organization for construction of a collective bargaining agreement and for the enforcement of certain individual employees' alleged rights to unpaid wages under the agreement. The Supreme Court, through Mr. Justice Frankfurter, held that the action was not within the jurisdiction of the Federal Courts, as conferred by Section 301. The Court rejected the argument that Section 301 gave rise to federal substantive rights, stating, "To turn Section 301 into an agency for working out a viable theory of the nature of a collective bargaining agreement smacks of unreality." (348 U.S. 456, 75 S.Ct. 498). After *Westinghouse* in 1955, as after *Hutcheson* in 1941, in the state of the law as then interpreted by this Court, there was no doubt but that Norris-LaGuardia prohibited Federal Court injunctions in "labor disputes", including ones such as the case at bar.

However, a dramatic change of direction was to take place and the Court's construction of Section 301 in *Westinghouse* was not to have much longevity. Two years later, in 1957, *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 71 S. Ct. 912, was decided. This decision is popularly referred to as *Lincoln Mills*. It was an action brought by the plaintiff union in the District Court to compel enforcement of an arbitration agreement contained in a collective bargaining agreement. The agreement provided that there would be no strikes or work stoppages, and that grievances would be handled pursuant to a specified procedure, the last step being arbitration. The union sued because the employer had refused to arbitrate. The Court, in an opinion by Mr. Justice Douglas, again considered the proper construction of Section 301 and

held that it "* * * authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances * * *." (353 U.S. 451, 77 S.Ct. 915).

Westinghouse was dismissed in a footnote as "* * * quite a different case." (353 U.S. 456, 77 S. Ct. 917). The Court said:

> "Thus collective bargaining contracts were made 'equally binding and enforceable on both parties.' Id., p. 15. As stated in the House Report, supra, p. 6, the new provision 'makes labor organizations equally responsible with employers for contract violations and provides for suit by either against the other in the United States district courts.' To repeat, the Senate Report, supra, p. 17, summed up the philosophy of § 301 as follows: 'Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace.'
>
> "*Plainly the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike.* Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way." (Emphasis ours.) (353 U.S. 454, 77 S.Ct. 916-917).

The Court added:

> "The question then is, what is the substantive law to be applied in suits under § 301(a)? We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." (353 U.S. 456, 77 S.Ct. 918).

The Court then turned to the question whether jurisdiction to compel arbitration was withdrawn by Norris-LaGuardia and reviewed the history of that legislation, holding that although a literal reading of Norris-LaGuardia might prohibit enforcement of agreements to arbitrate, "* * * we see no justification in policy for restricting Section 301(a) to damage suits, leaving specific performance of a contract to arbitrate grievance disputes to the inapposite procedural requirements of that Act." (353 U.S. 458, 77 S.Ct. 918). Although Mr. Justice Frankfurter dissented vigorously, citing *Westinghouse,* Section 301 thus became a charter of great scope within which the federal judiciary was to erect a federal law governing collective bargaining agreements.

Predictably, *Lincoln Mills* gave rise to extensive litigation. One of the cases spawned by *Lincoln Mills* was *Sinclair Refining Company v. Samuel M. Atkinson,* 370 U.S. 195, 82 S.Ct. 1328, decided in 1962. It involved an action by an employer against a union brought in the Federal District Court to enjoin alleged violation of a no-strike agreement and for other relief. The defendant union argued that Norris-LaGuardia barred the issuance of an injunction against work stoppages, even if in breach of a labor agreement and even if, as alleged, there was a pattern of repeated and deliberate vio-

lations of the contract by the defendant union. Five Justices, in an opinion by Mr. Justice Black, held that the action did involve a "labor dispute" within the meaning of Norris-LaGuardia, held that Norris-LaGuardia prohibited the issuance of an injunction in such a situation by a Federal Court, and held that Section 301 was not a repeal of Norris-LaGuardia. Justices Brennan, Douglas and Harlan dissented, saying to hold that Section 301 did not repeal Norris-LaGuardia was only the beginning of proper judicial inquiry. The dissenters pointed out:

> "The Court has long acted upon the premise that the Norris-LaGuardia Act does not stand in isolation. It is one of several statutes which, taken together, shape the national labor policy. Accordingly, the Court has recognized that Norris-LaGuardia does not invariably bar injunctive relief when necessary to achieve an important objective of some other statute in the pattern of labor laws. See Brotherhood of Railroad Trainmen v. Chicago River R. Co., 353 U.S. 30, 77 S.Ct. 635, 1 L.Ed. 2d 622; Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232, 70 S. Ct. 14, 94 L.Ed. 22; Virginian R. Co. v. System Federation, 300 U.S. 515, 562-563, 57 S.Ct. 592, 81 L.Ed. 789. In Chicago River we insisted that there 'must be an accommodation of [the Norris-LaGuardia Act] and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved.'
>
> "These decisions refusing inflexible application of Norris-LaGuardia point to the necessity of a careful inquiry whether the surface conflict between § 301 and § 4 is irreconcilable in the setting

before us: a strike over a grievance which both parties have agreed to settle by binding arbitration. I think that there is nothing in either the language of § 301 or its history to prevent § 4's here being accommodated with it, just as § 4 was accommodated with the Railway Labor Act.

"It cannot be denied that the availability of the injunctive remedy in this setting is far more necessary to the accomplishment of the purposes of § 301 than it would be detrimental to those of Norris-LaGuardia. Chicago River makes this plain. We there held that the federal courts, notwithstanding Norris-LaGuardia, may enjoin strikes over disputes as to the interpretation of an existing collective agreement, since such strikes flout the duty imposed on the union by the Railway Labor Act to settle such 'minor disputes' by submission to the National Railroad Adjustment Board rather than by concerted economic pressures. We so held, even though the Railway Labor Act contains no express prohibition of strikes over 'minor disputes,' because we found it essential to the meaningful enforcement of that Act—and because the existence of mandatory arbitration eliminated one of the problems to which Norris-LaGuardia was chiefly addressed, namely, that 'the injunction strips labor of its primary weapon without substituting any reasonable alternative.'

"That reasoning is applicable with equal force to an injunction under § 301 to enforce a union's contractual duty, also binding on the employer, to submit certain disputes to terminal arbitration and to refrain from striking over them. The federal

law embodied in § 301 stresses the effective enforcement of such arbitration agreements. When one of them is about to be sabotaged by a strike, § 301 has as strong a claim upon an accommodating interpretation of § 4 as does the compulsory arbitration law of the Railway Labor Act. It is equally true in both cases that '[an injunction] alone can effectively guard the plaintiff's right,' International Ass'n of Machinists v. Street, 367 U.S. 740, 773, 81 S. Ct. 1784, 1802, 6 L.Ed.2d 1141. It is equally true in both cases that the employer's specifically enforceable obligation to arbitrate provides a 'reasonable alternative' to the strike weapon. It is equally true in both cases that a major contributing cause for the enactment of Norris-LaGuardia—the at-largeness of federal judges in enjoining activities thought to seek 'unlawful ends' or to constitute 'unlawful means'—is not involved. Indeed, there is in this case a factor weighing in favor of the issuance of an injunction which was not present in Chicago River: the express contractual commitment of the union to refrain from striking, viewed in light of the overriding purpose of § 301 to assist the enforcement of collective agreements.

"In any event, I should have thought that the question was settled by Textile Workers v. Lincoln Mills, 353 U.S. 448, 77 S.Ct. 912, 1 L.Ed.2d 972. In that case, the Court held that the procedural requirements of Norris-LaGuardia's § 7, although in terms fully applicable, would not apply so as to frustrate a federal court's effective enforcement under § 301 of an employer's obligation to arbitrate.

It is strange, I think, that § 7 of the Norris-LaGuardia Act need not be read, in the face of § 301, to impose inapt procedural restrictions upon the specific enforcement of an employer's contractual duty to arbitrate; but that § 4 must be read, despite § 301, to preclude absolutely the issuance of an injunction against a strike which ignores a union's identical duty." (370 U.S. 217-220, 82 S.Ct. 1340-1342).

Among the questions given birth by *Lincoln Mills* and requiring decision was the matter of removal of 301 actions from State to Federal Courts, the Court having held that such actions remain cognizable in both State and Federal Courts in *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502, 82 S.Ct. 519, and that the State Courts must apply federal law in such actions.

Local 174 Teamsters v. Lucas Flour, 369 U.S. 95, 82 S.Ct. 571.

After differing decisions in the Circuits, the Court, in 1968, decided *Avco Corp. v. Aero Lodge No. 735, I.A.M.,* 390 U.S. 557, 88 S.Ct. 1235. Because of this decision and the now existing state of the law respecting Section 301, no longer can it be said that Norris-LaGuardia prohibits injunctive relief in the case at bar. The petitioner brought suit in a State Court to enjoin the respondent union from striking at the petitioner's plant. The heart of the complaint was a no-strike clause in the labor agreement by which grievances were to be settled in arbitration. The State Court issued an injunction, and the respondent union then moved in the Federal District Court for removal of the case. A motion to remand to the State Court was

made and denied. The Supreme Court held that the case was removable to the Federal Court under 28 U.S.C. § 1441. Another question in the case was whether, after removal, the Federal Court was barred from continuing the state injunction in effect or from issuing an injunction itself. As Justices Stewart, Harlan and Brennan point out in their concurring opinion this question is now expressly left undecided and open.

> "As the Court says, it is not clear whether or not the District Judge dissolved the injunction 'because it felt that action was required by Sinclair Refining Co. v. Atkinson, 370 U.S. 195,' ante, at ...., n. 4. Accordingly, the Court expressly reserves decision on the effect of Sinclair in the circumstances presented by this case. The Court will, no doubt, have an opportunity to reconsider the scope and continuing validity of Sinclair upon an appropriate future occasion."

IV

A Proper Accommodation Of Section 301 To Norris-La-Guardia Requires The Conclusion That Federal Courts Possess Injunctive Power In Section 301 Actions.

As the decisions reviewed in the preceding Section clearly show, the Supreme Court has for many years followed a policy of accommodating the various labor enactments to each other so as to fashion a meaningful and coherent national labor policy. This policy, which had its genesis in the *Hutcheson* decision, has resulted in what might be termed a judicially fashioned federal common law of labor relations which must be applied by both the State and Federal Courts in actions in-

volving labor agreements. The *Sinclair* case, however, is an anomaly which now under *Avco* stands alone and discredited; particularly in cases wherein labor organizations have violated no-strike pledges of their contracts. It has been said by many commentators that *the agreement not to strike on the part of a labor organization is the only real consideration received by an employer from the union for a collective bargaining agreement.* Since the Supreme Court in *Avco* has held that injunction actions for breach of labor contracts may be removed from State Courts to the Federal Courts under their 301 jurisdiction, it would, indeed, be incongruous were the Federal Courts to be powerless to grant an employer the only effective remedy in such situations.

Just as the Supreme Court's decision in *Lincoln Mills* forever interred its earlier decision in *Westinghouse, Avco* has buried *Sinclair.* In *Avco,* the State Court had granted an employer a temporary injunction restraining economic activity by the union in breach of its contract to arbitrate. The District Court dissolved the State Court injunction on removal, and this order was affirmed by the Court of Appeals. The Supreme Court refused to decide the issue raised (whether the District Court had the power to grant the injunction sought by the employer), for the reason that the court could not determine from the record "Whether it (District Court) did so because it felt that action was required by *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195, or because of its equity powers or both * * *". (*Avco v. Aero Lodge,* 88 S. Ct. 1235, Fn. 4). The Supreme Court expressly reserved decision upon the issue, and Mr. Justice Stewart, with Mr.

Justice Harlan and Mr. Justice Brennan concurring, specifically noted that "The Court will no doubt have an opportunity to reconsider the scope and continuing validity of *Sinclair* upon an appropriate future case." The future case is, indeed, before this Court in this action.

The conclusion that *Sinclair* was "wrongly decided" and a mistaken departure from the harmonious scheme developed by the Court in this area was reached by a number of legal writers even before *Avco*. (See, for example, Aaron, *Strikes In Breach Of Collective Agreements: Some Unanswered Questions*, 63 Col. L.R. 1027, 1034, 1051). Professor Harry H. Wellington and Editor Lee A. Albert, in 72 Yale L.J. 1547 (*Statutory Interpretation And The Political Process: A Comment On Sinclair V. Atkinson*), state that "An examination of the central purposes of Section 4 of Norris-LaGuardia and Section 301 of the Labor Management Relations Act supports the conclusion of the dissenting Justices of the Supreme Court. Preclusion of injunctive relief for a strike over an arbitrable grievance would work greater damage to the core policies of Section 301, *especially in light of the gloss that statute has acquired since 1958*, than allowance of such relief would work on the policies of Norris-LaGuardia." (p. 1552; emphasis added.)

In their discussion of the question, these writers also state that:

> "While the purpose underlying the Norris-LaGuardia Act suggests that that statute should not preclude a district court from enjoining a breach of contract strike over an arbitrable grievance, the purpose embodied in section 301 of the Labor

Management Relations Act strongly suggests the desirability of the strike injunction. This judgment about section 301's purpose is particularly compelling given the gloss put upon the statute by the Supreme Court.

"*Lincoln Mills* is the key decision. In that case the Court in 1958 held that section 301 empowered a federal district court to order specific performance of a promise to arbitrate unresolved grievances. *Lincoln Mills* went a long way towards making arbitration the central institution in the administration of collective bargaining contracts. Subsequent decisions have elaborated the consequences of this recognition. Once the parties include an arbitration clause in their collective bargaining contract they are bound, as a matter of federal law, to submit the vast bulk of disputes that they are unable to resolve by negotiation to an arbitrator. Neither the employer nor the union is free to disregard this obligation." (72 Yale L.J. 1547, 1557).

Thus, the decision of the Supreme Court in *Lincoln Mills* furnishes the legal basis for the re-examination of the validity of *Sinclair* which, the concurring Justices in *Avco* make clear, must now be undertaken in the light of *Avco*. In its decision in *Lincoln Mills,* the Supreme Court expressly related an agreement to arbitrate to an agreement not to strike, one being the consideration for the other. Thus, the Court held that Section 301 established "* * * federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way." In this

connection, the Court stated that upon review of the Congressional history of Section 301, "* * * it became abundantly clear that the purpose of the section was to provide the necessary legal remedies." The Court found the basis for this conclusion in an exchange between Congressman Barden and Congressman Hartley, the sponsor of the bill, during the course of the debates thereon. Congressman Barden asked if his understanding was correct that the proposed legislation (Section 301) "* * * contemplates not only the ordinary lawsuits for damage but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances; * * *." Congressman Hartley responded that Congressman Barden was "absolutely correct". (353 U.S. 454, 455-456, 77 S.Ct. 916-917).

Since *Avco,* then, there can be no question but that the *Sinclair* decision has lost its validity and is no longer controlling law. The Supreme Court reviewed *Avco* because of conflict between the Courts of Appeal for the Sixth Circuit's decision in *Avco* and the decision of the Third Circuit in *American Dredging Co. v. Local 25,* 338 F. 2d 387. In *American Dredging,* the Court of Appeals for the Third Circuit held that the District Court below erred in failing to remand an employer's injunction suit (which had been removed from the State Court in which it had been filed), on the grounds that the denial of remand "* * * led to the 'absurd consequence' of leaving the District Court with a case on its judicial hands without power to make a final decree on its merits * * *".

Now that the Supreme Court has rejected the approach of the Third Circuit in *American Dredging* and

has determined that injunction actions for breach of no-strike clauses in labor contracts by unions are properly removable to the Federal Courts, unless Section 4 of Norris-LaGuardia is accommodated with Section 301 of the Taft-Hartley Act, the same "absurd consequences" necessarily follow. Labor agreements containing no-strike covenants are otherwise as a practical matter utterly unenforceable and will, in fact, become totally meaningless if the Federal Courts are powerless to restrain labor organizations from deliberate violation of these promises. If this be so, the consideration received by employers as the *quid pro quo* for their agreements to arbitrate disputes are only a vain and idle fancy.

The harmonizing approach of Mr. Justice Frankfurter in the *Hutcheson* case must be adopted by the Court in order that plaintiff be spared the total injustice which is inevitable if *Sinclair* be blindly followed in the light of the *Avco* decision. The range of judicial inventiveness demanded by *Lincoln Mills* must be employed to interlace Section 4 of the Norris-LaGuardia Act and Section 301 of the Labor-Management Relations Act in such a manner as to permit effective enforcement of arbitration and no-strike agreements. The Congressional purpose in the enactment of the Norris-LaGuardia Act cannot be said to have encompassed the denial to the Federal Courts of their traditional equitable powers to compel specific performance of lawful collective bargaining agreements, and it is now clear that the substantive federal labor policy inherent in Section 301 can-

not be permitted to be sabotaged by mere adoption of a plain and literal interpretation of the Norris-LaGuardia Act which was enacted in an entirely different climate over thirty years ago.

Plaintiff, therefore, submits that defendant's motion to quash the Temporary Restraining Order should be summarily denied, and that the Court should issue its orders:

1. Compelling defendant to arbitrate its dispute with plaintiff, as required by the contract;

2. Requiring defendant to specifically perform the grievance and arbitration provisions of the contract; and

3. Enjoining defendant pendente lite from further breach of the no-strike provisions of the contract in the same terms and with like force and effect as defendant was restrained by the State Court.

Respectfully submitted,

* * *

Attorneys for Plaintiff.

(Affidavit of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 69-337-CC

The Boys Markets, Inc., a California corporation, Plaintiff, vs. Retail Clerks Union, Local 770, an unincorporated association, Defendant.

Findings of Fact and Conclusions of Law.

Filed March 13, 1969.

This cause came on to be heard by the Court, the Honorable Charles H. Carr United States District Judge Presiding, on the 10th day of March, 1969, on the motion of plaintiff for an order compelling arbitration; for specific performance of contract; and for injunction pending arbitration, and on the motion of defendant to quash the Temporary Restraining Order heretofore issued by the Superior Court of the State of California for the County of Los Angeles in Case No. 948323, removed to this Court, and the Court having considered the verified complaint, declaration and memorandum of points and authorities filed by plaintiff in the State Court, the supplemental memorandum of points and authorities and motion filed by plaintiff herein, and the motion of defendant to quash the said Temporary Restraining Order and the memorandum of points and authorities of defendant, and having heard the argument of counsel, finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. Plaintiff, The Boys Markets, Inc., is a corporation duly organized and existing under the laws of the State of California and owns and operates a chain of

retail food supermarkets, one of which said supermarkets is located at 7230 Atlantic Boulevard in the City of Cudahy within this District. Plaintiff employs retail clerks in the said supermarket located at 7230 Atlantic Boulevard, Cudahy, California, who are represented for collective bargaining purposes by defendant.

2. Defendant, Retail Clerks Union Local 770, is an unincorporated assocation functioning as a labor organization, affiliated with the Retail Clerks International Association, AFL-CIO, being composed of several thousand members who are employed as retail clerks in supermarkets, drug stores, discount stores and other retail establishments who are represented for collective bargaining purposes by said labor organization with its principal offices located within this District.

3. Plaintiff and defendant executed and entered into a contract, in writing, known as "Retail Food, Bakery, Candy, and General Merchandise Agreement, April 1, 1964—March 31, 1969", which said contract provided for and established the wages, hours, benefits and conditions of employment for the employees of plaintiff employed as retail clerks in plaintiff's supermarket located at 7230 Atlantic Boulevard, Cudahy, California.

4. Article XIV of said contract, entitled "Adjustment And Arbitration" provides as follows:

"ARTICLE XIV

"ADJUSTMENT AND ARBITRATION

"A. CONTROVERSY, DISPUTE OR DISAGREEMENT. Any and all matters of controversy, dispute or disagreement of any kind or character existing between the parties and arising out of or in any way involving the interpretation or

application of the terms of this Agreement, except as may be otherwise provided in Paragraph D of this Article, shall be settled and resolved by the procedures and in the manner hereinafter set forth.

"B. ADJUSTMENT PROCEDURE.

"1. *Store Level.* The Union through its representatives shall attempt to settle or resolve any such matter with the appropriate store supervisor or person designated by the Employer in the manner indicated in Article X of this Agreement.

"2. *Meeting of Representatives.* Upon receipt of a written notice from either party, the representatives of the Employer and the representatives of the Union shall meet within a calendar week and attempt to settle or resolve the matter.

"3. *Food Employers Council, Inc.* The union hereby recognizes the Food Employers Council, Inc. as the authorized representative of its members in matters pertaining to the negotiation and administration of this Agreement. In the event of a dispute, it shall be the duty of the Employer to notify the Food Employers Council, Inc. of the existing dispute if said Employer desires said Food Employers Council, Inc. to represent it in the dispute. Should a grievance or dispute be settled between the Union and any Employer signatory to this Agreement without the participation of the Food Employers Council, Inc. and if in such settlement, an interpretation of any language or phrase of this Agreement is involved in order that such settlement be reached, the Union

shall, within ten (10) days of such settlement notify Food Employers Council, Inc., in writing of the dispute, the language or the phrase interpreted, the settlement reached, and the date of such settlement. Should the Union fail to notify the Food Employers Council, Inc., as set forth above, the fact of settlement and the interpretation of the language or phrase of the Agreement involved in the settlement shall not be used in evidence for any purpose whatsoever. No such settlement or interpretation shall be binding upon the Food Employers Council, Inc. or its members unless the Council or its members thereof participated in arriving at such settlement or interpretation.

"C. ARBITRATION.

"1. Any matter not satisfactorily settled or resolved in Paragraph B hereinabove shall be submitted to arbitration for final determination upon written demand of either party. The written demand for arbitration may be made at any time after the expiration of fifteen (15) days from the date of the notice, submitting the matter under Paragraph B, subsection 2, hereinabove, to the meeting of representatives.

"2. The representatives of the Union and the representatives of the Employer shall meet for the purpose of selecting an impartial arbitrator within the ten (10) day period following the demand for arbitration. If no agreement upon an arbitrator is reached during this period, either party may then request a list of fifteen (15) persons qualified to act as arbitrators under this Agree-

ment, from the Federal Mediation and Conciliation Service and upon receipt of this list the parties shall immediately thereafter select the arbitrator by alternately striking names from the list until the last name remains. The parties shall draw lots to determine who shall make the first deletion from the list.

"3. Should either party desire, a board of arbitration shall be convened in lieu of a single arbitrator, consisting of an equal number of arbitrators appointed by each party (not to exceed two appointed by each), and the impartial arbitrator who shall be chairman. The board shall hear and determine the matter by majority vote of the members of the board.

"4. The arbitrator or board of arbitration shall be empowered to hear and determine the matter in question and the determination shall be final and binding upon the parties, subject only to their rights under law. The hearings shall be held within thirty (30) days after the selection of the arbitrator, or board, which shall have the power to decide the date or dates upon which the arbitration is to be held if agreement cannot be reached by the parties.

"D. POWERS, LIMITATIONS AND RESERVATIONS.

"1. *Arbitrator.* The arbitrator or board of arbitration shall not have the authority to decide questions involving the jurisdiction of any local, or of the International, or which may in any way affect or change the Union Security clause, nor shall the

arbitrator or board of arbitration have the authority to effect a change in, modify, or amend any of the provisions of this Agreement, or to make decisions on provisions covering wages or working conditions to be incorporated either in a new agreement or any subsequent annual agreement. If a question of the arbitrability of an issue is raised by either party, such question shall be determined in the first instance by the arbitrator or board. Neither party to this Agreement shall refuse to proceed to arbitration upon the grounds that the matter in question is not arbitrable.

"2. *Work Stoppages.* Matter subject to the procedures of this Article shall be settled and resolved in the manner provided herein. During the term of this Agreement, there shall be no cessation or stoppage of work, lock-out, picketing or boycotts, except that this limitation shall not be binding upon either party hereto if the other party refuses to perform any obligation under this Article or refuse or fails to abide by, accept or perform a decision or award of an arbitrator or board.

"3. *Wage Claims.* In the case of a direct wage claim or a claim for contributions to employee benefit plans which does not involve an interpretation of any of the provisions of this Agreement, either party may submit such claim for settlement to either the grievance procedure provided for herein or to any other tribunal or agency which is authorized and empowered to effect such a settlement.

"E. STATUS QUO. During the period of adjustment or arbitration as provided in this Article, the conditions in effect at the time of receipt of written notice, specified in Paragraph C above, shall continue in effect pending final decision.

"F. EXPENSES. The expenses of the arbitrator shall be borne equally by both the Employer and the Union.

"G. TIME LIMITS. The time limits set forth above may be extended by mutual agreement between the parties.

"H. REPORTING DISCREPANCIES. It shall be the responsibility of the employee to report any claimed discrepancy to the Union promptly upon discovery, and it shall then become the responsibility of the Union to notify the Employer promptly of such claimed discrepancy. In any event, all complaints must be filed in writing within thirty (30) days after the matter in dispute or disagreement is first reported to the Union. Complaints not filed within the limits herein specified shall be deemed null and void."

5. Plaintiff and defendant became involved in a controversy, dispute and disagreement concerning the performance of certain work in plaintiff's supermarket located at 7230 Atlantic Boulevard, Cudahy, California, on Tuesday, February 18, 1969. Defendant objected to the method used by plaintiff in relocating certain merchandise within frozen food cases located in said store, and defendant demanded that plaintiff require employees represented by defendant to remove all merchandise from said frozen food cases, return said

merchandise to the main freezer in the backroom of the store and thereafter restock all of said merchandise in the said frozen food cases. Defendant threatened that unless plaintiff agreed to such demands, defendant would cause a strike and work stoppage against plaintiff.

6. Plaintiff refused to agree to the demands made by defendant. Thereafter, on February 18, 1969, defendant and its representatives ordered, instructed and required all of the retail clerks employed by plaintiff in said store to leave their employment to engage in a strike and work stoppage against plaintiff. Plaintiff's employees, acting under and pursuant to defendant's instructions, ceased to perform their work for plaintiff and engaged in a strike and work stoppage against plaintiff. Defendant established a picket line on and about the premises of plaintiff's store, and defendant's pickets carried signs reading,

"LOCAL 770
THIS STORE ON STRIKE
PLEASE RESPECT OUR PICKET LINES"

Said strike, work stoppage and picketing continued until defendant was served with a Temporary Restraining Order issued by the Superior Court of the State of California for the County of Los Angeles in Case No. 948323.

7. On February 18, 1969, plaintiff caused a telegram to be sent to defendant demanding that the dispute be submitted to arbitration and that defendant cease and desist from the strike and work stoppage. Defendant failed and refused to agree to arbitrate the said dispute or to end its strike, picketing and work stoppage.

8. Unless defendant is enjoined and restrained from continuing to engage in the strike, picketing and work stoppage, it may be reasonably expected that plaintiff will suffer substantial and serious loss of business and customer patronage to plaintiff's substantial and irreparable injury and damage in excess of such damage as plaintiff may have already suffered, and greater injury will be inflicted upon plaintiff by the denial of relief than will be inflicted upon defendant by the granting of such relief.

9. It is impossible for plaintiff to ascertain the exact amount of damage and injury which plaintiff will sustain if defendant and its members are not enjoined from committing such acts, and plaintiff has no adequate remedy at law.

CONCLUSIONS OF LAW

1. Plaintiff and defendant are parties to a valid existing collective bargaining agreement, in writing, effective through March 31, 1969, which by its terms requires that any and all matters of controversy, dispute or disagreement of any kind or character existing between the parties and arising out of or in any way involving the interpretation or application of the terms of said contract shall be submitted to arbitration for final and binding determination of the merits of such controversy, dispute or disagreement, and which contract further provides that defendant and its members shall not engage in any cessation or stoppage of work or picketing by reason of any matter subject to the arbitration procedures of the contract.

2. During the term of said contract, plaintiff and defendant became engaged in a controversy, dispute or disagreement concerning the stocking of frozen food

cases at plaintiff's store located at 7230 Atlantic Boulevard, Cudahy, California. Said controversy, dispute or disagreement was of a type and character required by the terms of the said contract to be submitted to arbitration for final and binding determination.

3. Defendant, and members of defendant employed by plaintiff, engaged in a strike, picketing and work stoppage commencing on February 18, 1969, in substantial and material breach and violation of the contract between plaintiff and defendant.

4. Plaintiff has no plain, speedy or adequate remedy at law.

5. The Court has jurisdiction over plaintiff's cause and the relief sought thereunder by plaintiff under the provisions of Title 29, United States Code, Section 185.

6. Plaintiff's motion for an order compelling defendant to arbitrate the said controversy, dispute or disagreement must be granted.

7. Plaintiff's motion and application for injunction enjoining and restraining defendant and its members from engaging in a strike, picketing and work stoppage at plaintiff's store located at 7230 Atlantic Boulevard, Cudahy, California, pending submission of the aforesaid controversy, dispute or disagreement to arbitration, must be granted.

8. Defendant's motion to quash the Temporary Restraining Order, issued by the Superior Court of the State of California for the County of Los Angeles in Case No. 948323, must be denied.

DATED: March 12, 1969.

Charles H. Carr
United States District Judge

* * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Civil No. 69-337-CC

The Boys Markets, Inc., a California corporation, Plaintiff, vs. Retail Clerks Union, Local 770, an unincorporated association, Defendant.

Order Directing That Arbitration Proceed and Order Granting Injunction Pending Arbitration.

Filed Mar. 13, 1969.

This cause came on to be heard by the Court, the Honorable Charles H. Carr, United States District Judge Presiding, on the 10th day of March, 1969, on the motion of plaintiff for an order compelling arbitration; for specific performance of contract; and for injunction pending arbitration, and on the motion of defendant to quash the Temporary Restraining Order heretofore issued by the Superior Court of the State of California for the County of Los Angeles in Case No. 948323, said action having been removed to this Court. Plaintiff, appearing by its counsel, Law Offices of Joseph M. McLaughlin, by William B. Irvin, Esq., and defendant appearing by its counsel, Arnold, Smith & Schwartz, by Gerald A. W. Haight, Esq. The Court having considered the verified complaint of plaintiff, declaration, memorandum of points and authorities filed by plaintiff in the State Court, the supplemental memorandum of points and authorities and motion filed by plaintiff herein and the motion of defendant to quash the said Temporary Restraining Order and the memorandum of points and authorities of defendant, and having heard the argument of counsel,

and it appearing to the Court after due deliberation that plaintiff and defendant are parties to a valid and existing collective bargaining agreement in writing; that said contract requires that any and all matters of controversy, dispute and disagreement of any kind or character existing between the parties and arising out of or in any way involving the interpretation or application of the terms of said contract shall be submitted to final and binding arbitration; that defendant under and pursuant to the terms and provisions of said contract promised, covenanted and agreed that the Union and its members, employees of plaintiff, would not engage in any strike, work stoppage or other concerted activity against plaintiff upon or by reason of any controversy, dispute or disagreement required by said contract to be submitted to arbitration; that plaintiff and defendant are engaged in a controversy, dispute or disagreement arising out of and involving the interpretation or application of the provisions of their said contract relating to the performance of certain work within plaintiff's store, and that said controversy, dispute or disagreement is of the kind or character required by the said contract to be submitted to an impartial arbitrator for binding determination; that defendant, in breach of the terms and provisions of its said contract, engaged in a strike against plaintiff and induced, encouraged and persuaded plaintiff's employees to cease performing their work for plaintiff and to engage in a strike and work stoppage, and that by reason of the acts committed by defendant, plaintiff has suffered irreparable injury and will continue to suffer irreparable injury unless defendant is enjoined and restrained from committing the said acts.

It further appearing to the Court that the Court has jurisdiction of the subject matter of the action and to grant the relief sought by plaintiff under Title 29, United States Code, Section 185, and good cause appearing therefor:

IT IS ORDERED that the controversy, dispute or disagreement between plaintiff and defendant relating to or concerning the performance of work in and upon the frozen food display cases in plaintiff's market located at 7230 Atlantic Boulevard, Cudahy, California, be submitted to arbitration in accordance with the terms and provisions of Article XIV of the contract between plaintiff and defendant, known as "Retail Food, Bakery, Candy, and General Merchandise Agreement, April 1, 1964—March 31, 1969", and that plaintiff and defendant proceed with diligence so that said arbitration shall be completed and the decision and award of the arbitrator rendered within sixty (60) days of the date of this order or within such further time as may be necessarily required under the circumstances.

IT IS FURTHER ORDERED that defendant, its officers, agents, representatives, members, employees, and each of them, and all persons acting in aid or in concert with defendant, be and they hereby are enjoined and restrained, pending the decision and award of the impartial arbitrator, from doing or attempting to do, or threatening to do, and from causing to be done, either directly or indirectly, by any means, method or device

whatsoever, any and all of the following acts in connection with, related to or in furtherance of a strike or work stoppage against plaintiff involving the pending dispute as to the stocking of frozen foods:

(a) Picketing at, around or in the vicinity of the premises of plaintiff's retail supermarket located at 7230 Atlantic Boulevard in the City of Cudahy, County of Los Angeles, State of California, or any other supermarket of plaintiff.

(b) Carrying or displaying signs or placards which state in any manner that plaintiff's employees are on strike or requesting in any manner customers or potential customers not to patronize plaintiff or its supermarkets, or which, in any manner, infer that a strike or labor dispute against or involving plaintiff is in progress.

(c) Engaging in any strike, concerted work stoppage or other economic activity at or about the premises of plaintiff's retail store located at 7230 Atlantic Boulevard in the City of Cudahy, County of Los Angeles, California, or at any other supermarket of plaintiff.

(d) Inducing, instructing, persuading or encouraging plaintiff's employees, or any of them, to engage in a strike, work stoppage, picketing or other economic activity against plaintiff or to fail or refuse to perform their work and services in a regular and normal manner for plaintiff.

(e) From stating to or informing customers or potential customers of plaintiff that plaintiff's employees are

on strike or that plaintiff's store at 7230 Atlantic Boulevard in Cudahy, California, is closed or that there is no service in plaintiff's food store or from in any manner persuading, inducing or encouraging or attempting to persuade, induce or encourage plaintiff's customers or potential customers not to patronize plaintiff or to patronize plaintiff's competitors.

(f) From blocking, obstructing or impeding or attempting to block, obstruct or impede the ingress or egress of customers and potential customers to and from plaintiff's said store or at any other supermarket of plaintiff.

(g) From intimidating, inducing, persuading or encouraging or attempting to intimidate, induce, persuade or encourage employees of suppliers of plaintiff to refuse to deliver goods and merchandise to plaintiff's said store.

The foregoing order for Injunction shall be effective when plaintiff has given security in the sum of $1,000.00 corporate surety bond.

IT IS FURTHER ORDERED that defendant's motion to quash Superior Court Temporary Restraining Order be and hereby is denied.

DATED: March 12, 1969.

CHARLES H. CARR
UNITED STATES DISTRICT JUDGE

* * *

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Title Omitted in Printing)

No. 69-337-CC

Answer.

The Defendant, RETAIL CLERKS UNION, LOCAL 770, answers the Complaint herein as follows:

1. As to each and every allegation contained in Paragraphs I, II, III, and IV; the Defendant admits thereto.

2. As to each and every allegation contained in Paragraphs V and VI of the Complaint, Defendant denies that they have any knowledge or information thereof sufficient to form a belief.

3. Defendant denies each and every allegation contained in Paragraphs VII, VIII, and IX.

4. Defendant denies each and every allegation contained in Paragraph X of the Complaint, except Defendant admits that Plaintiff has caused a telegram to be sent to the Defendant demanding that the dispute be submitted to arbitration.

5. Defendant denies each and every allegation contained in Paragraph XI.

WHEREFORE, Defendant demands judgment that the Complaint herein be dismissed and that they have their costs and disbursements of this action.

DATED: March 13, 1969.

* * *

Attorneys for Defendant

(Certificate of Service Omitted in Printing)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

(Title Omitted in Printing)

No. 69-337-CC

Notice of Appeal.

Notice is hereby given that Retail Clerks Union, Local 770, defendant above named, hereby abandons the Notice of Appeal filed on March 14, 1969, and instead, appeals to the United States Court of Appeals for the Ninth Circuit from the Order entitled ORDER DIRECTING THAT ARBITRATION PROCEED AND ORDER GRANTING INJUNCTION PENDING ARBITRATION signed by Judge Carr on March 12, 1969. This appeal is from each and every portion of the aforesaid Order including the Order to submit the dispute to arbitration, the Order granting plaintiff's Motion for Injunction, and the Order denying defendant's Motion to Quash Superior Court Temporary Restraining Order.

In accordance with Rule 32 of the Local Rules of the Central District of California, the names of the parties to this Order and the names and addresses of their respective attorneys are:

The Boys Markets, Inc., Appellees herein, who are represented by Joseph M. McLaughlin, Esq., Suite 700, 655 South Hope Street, Los Angeles, California 90017; Retail Clerks Union, Local 770, Appellant herein, who is represented by the Law Firm of: Arnold, Smith &

Schwartz, Suite 950, 6404 Wilshire Boulevard, Los Angeles, California 90048.

The defendant is entitled to an expedited hearing of its appeal under 29 U.S.C. §110.

DATED: March 28, 1969.

* * *

Attorneys for Defendant

(Affidavit of Service Omitted in Printing)

(Designation of Record on Appeal Omitted in Printing)

(Statement of Points on Appeal Omitted in Printing)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The Boys Markets Inc., a California corporation, Appellant, vs. Retail Clerks Union, Local 770, an unincorporated association Appellee. No. .....

Transmitted Record 69-337-Judge Carr, USDC.

UPON APPEAL FROM THE UNITED
STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

The Boys Markets, Inc., a California corporation, Plaintiff, v. Retail Clerks Union, Local 770, an unincorporated association, Defendant. No. 69-337-CC

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Original and 2 copies of Reporter's Transcript of proceedings had on: February 4, March 10, 1969

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above entitled Court, hereby certify the documents listed herein, together with the other listed items, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above entitled case.

May 9, 1969

JOHN A. CHILDRESS, CLERK
By Carol Vasquez, Deputy Clerk

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Boys Markets, Inc., Appellee vs. Retail Clerk's Union, Local 770, Appellant. No. 24004.

Judgment.

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be and hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

Filed and entered September 26, 1969.

Opinion of the United States Court of Appeals For the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

The Boys Markets, Inc., *Appellee,* vs. Retail Clerk's Union, Local 770, *Appellant.* No. 24,004.

[September 26, 1969]

Appeal from the United States District Court for the Central District of California

Before: HAMLIN and DUNIWAY, Circuit Judges, and SMITH, District Judge*

HAMLIN, Circuit Judge

The Boys Markets, Inc., appellee herein, filed an action in California state court against the Retail Clerk's Union, Local 770, appellant herein, seeking to enjoin a strike being carried on by appellant against appellee and seeking an order for specific performance of an agreement to arbitrate. Appellant and appellee had prior thereto entered into a collective bargaining agreement which provided for arbitration of all disputes involving the interpretation of the agreement and which also contained a promise by appellant not to engage in any strike or work stoppage or any other concerted economic activity. This agreement was in effect at the time the strike was called by the appellant.

The California court issued a temporary injunction restraining the Union from striking. The Union then removed the case to the United States District Court for the Central District of California, and sought to

*Honorable Russell E. Smith, United States District Judge, Missoula, Montana, sitting by designation.

quash the injunction. After a hearing the district court issued its order enjoining the Union from striking and ordered the parties to arbitrate the dispute which had given rise to the strike. The Union appealed to this court from the district court's order. We have jurisdiction under 28 U.S.C. § 1291.

This case involves the interplay of two of the major statutes in the area of labor law, section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104) and section 301 of the Labor-Management Relations Act (29 U.S.C. § 185). Section 301 provides:

> "Suits for violation of contracts between an employer and a labor orgainzation . . . may be brought in any district court of the United States."

The landmark *Lincoln Mills* decision, 353 U.S. 448 (1957), held that section 301 was not merely procedural, but rather it gave to the federal courts power to establish a body of substantive federal law. A normal adjunct of federal power, of course, is the equitable remedy of an injunction.

However, section 4 of the Norris-LaGuardia Act deprives the federal courts of jurisdiction to issue injunctions against strikes or work stoppages in most cases growing out of a labor dispute. The strike action taken by the Union in the instant case falls squarely within the proscription of section 4; this much is conceded by the appellee. The appellee's contention, which was upheld by the court below, is that section 4 does not forbid a federal court to issue an injunction where the union strike is in violation of a no-strike clause. Thus, the sole question on this appeal is whether the court below had jurisdiction to enjoin a strike where that strike is in violation of a no-strike clause.

This question has previously been answered in favor of the Union by the Supreme Court in *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195 (1962). *Sinclair* is nearly on all fours with the instant case: the employer there was attempting to enjoin a union strike where the union struck in violation of a no-strike clause. Many of the policy arguments presented by the appellee in this case were addressed to the Court in *Sinclair.* However, the Court held that it was bound by the clear language of section 4 of the Norris-LaGuardia Act, and that a federal court does not have power to enjoin a strike in most cases growing out of a labor dispute, even where that strike is in violation of a no-strike clause. See also *A. H. Bull Steamship Co. v. Seafarers' International Union,* 250 F.2d 326 (2nd Cir. 1957); *General Electric Co. v. Local Union 191,* ..... F.2d....., 71 LRRM 2903, (5th Cir. 1969).

We see nothing in *Avco Corp. v. Aero Lodge No. 735,* 390 U.S. 557 (1968), relied on by appellee, which would permit us not to follow the holding in *Sinclair.* The question decided in *Avco* was whether, after the union has petitioned for removal of an action brought by the employer in state court, the employer can remand the case to state court. The Court held that the employer could not remand the case to state court. The underlying facts of the dispute in *Avco* were very similar to the facts in *Sinclair* and the instant case, but the Court reserved consideration of the *Sinclair* question. This court therefore remains bound by the holding of *Sinclair.*[1]

[1]It is worthy of note that although the Supreme Court in *Sinclair* made it clear that Congress alone could change the result reached by the Court in that case, Congress has not yet seen fit to do so.

Appellee's reliance upon *International Longshoremen's Assn. Local 1291 v. Philadelphia Marine Trade Assn.*, 389 U.S. 64 (1968), and *New Orleans Steamship Assn. v. General Longshore Workers*, 389 F.2d 369 (5th Cir.), cert. denied, 393 U.S. 828 (1968), is misplaced. In each of these cases the order of the court was made after an arbitration award had been made. In the *Philadelphia Marine* case, the complaint had alleged that the union had refused "to abide by the terms of the arbitrator's award" and prayed for an order enforcing the arbitrator's award. In that case the Supreme Court set aside the order of the district court enforcing the award as being too vague.

In the *New Orleans Steamship Association* case, an arbitration award had been made and the action was by the Steamship Association seeking an order to enforce the award of the arbitrator. The court of appeals held that the district court had jurisdiction to enforce the award and that it erred in dismissing the complaint.

In the instant case no arbitration award has been made, and the *Sinclair* case is controlling. Accordingly, we reverse the judgment of the district court enjoining appellant's strike and remand the case for further proceedings.

SUPREME COURT, U. S.

FILED
OCT 24 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969
No. 768

THE BOYS MARKETS, INC.,

Petitioner,

vs.

RETAIL CLERK'S UNION, LOCAL 770,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

JOSEPH M. McLAUGHLIN,
WILLIAM B. IRVIN,
655 South Hope Street,
Suite 700,
Los Angeles, Calif. 90017,
(213) 627-5237,
Counsel for Petitioner, The Boys Markets, Inc.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 625-9790

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IN THE

Supreme Court of the United States

October Term, 1969
No. .....

THE BOYS MARKETS, INC.,
Petitioner,

vs.

RETAIL CLERK'S UNION, LOCAL 770,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on September 26, 1969.

Citations to Opinions Below.

The Findings of Fact and Conclusions of Law [R. 112] and the Order Directing That Arbitration Proceed and Order Granting Injunction Pending Arbitration [R. 106] of the United States District Court for the Central District of California, printed in Appendix B hereto, *infra*, pp. 4-18, were not officially reported.[1] The opinion of the Court of Appeals for the Ninth Circuit, printed in Appendix C hereto, *infra*, pp. 19-23, is reported in .... F. 2d .....

[1] See 70 LRRM 3071; 59 LC ¶13,366.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 26, 1969 [R. Vol. One]; p. 23, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

Question Presented.

Whether the United States District Courts have jurisdiction under Section 301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C., Section 185, to enjoin strikes and work stoppages by labor organizations in violation of the promises contained in their labor agreements with employers not to engage in strikes or work stoppages during the term of the agreement and to submit all disputes and grievances to arbitration, and whether Section 4 of the Norris-LaGuardia Act, 29 U.S.C., Section 104, should be held not to bar the issuance of such injunctions but should be accommodated with Section 301.

Whether the United States District Courts are compelled, after removal of an action from a State Court in which an injunction was granted against a labor organization, to dissolve such injunction because of the command of Section 4 of the Norris-LaGuardia Act.

Whether the decision of this Court in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), should be overturned.

Statutes Involved.

The statutory provisions involved are Section 301 of the Labor-Management Relations Act of 1947, as amended, 61 Stat. 156, 29 U.S.C., Section 185(a), and Section 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C., Section 104. They are printed in Appendix A, *infra*, pp. 1-3.

Statement of the Case.

This petition seeks review of a judgment of the Court of Appeals for the Ninth Circuit reversing an order of a District Court in a removed action enjoining a strike by Respondent Union pending arbitration of a collective bargaining dispute with Petitioner. Respondent engaged in a strike and work stoppage at one of Petitioner's retail food supermarkets. The applicable collective bargaining agreement required the submission of all disputes to arbitration and prohibited strikes and work stoppages.

Petitioner made application to the California Superior Court for a Temporary Restraining Order, which application was granted. The State Court action was then removed by Respondent to the United States District Court for the Central District of California, and a motion was made to quash the Temporary Restraining Order. This motion was denied. Petitioner's countermotion for specific performance of the agreement to arbitrate and for an injunction against the strike and work stoppage pending arbitration was granted by the District Court.

The jurisdiction of the District Court was invoked because the question arose under a law relating to commerce, the Labor-Management Relations Act of 1947, as amended, and under Section 301 thereof which grants District Courts jurisdiction of suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce.

Petitioner herein operates a chain of retail food supermarkets, and Respondent labor organization is the

collective bargaining representative of the retail clerks employed in certain of Petitioner's supermarkets.

The collective bargaining agreement between Petitioner and Respondent requires arbitration of "Any and all matters of controversy, dispute or disagreement of any kind or nature existing between the parties and arising out of or in any way involving the interpretation or application of the terms of this Agreement * * *" [R. 52; R. 113-114] and further provides that all matters subject to the arbitration agreement "* * * shall be settled and resolved in the manner provided herein", and that "during the term of this Agreement, there shall be no cessation or stoppage of work, lock-out, picketing or boycotts, * * *" [R. 3; R. 117].

During the term of the collective bargaining agreement, Petitioner and Respondent became engaged in a dispute concerning the performance of work in one of Respondent's supermarkets by non-bargaining unit employees. Respondent, contending that Petitioner had violated the contract, caused the employees of the store to cease performing their work and to engage in a strike, and Respondent established a picket line at the store in question.

Petitioner demanded arbitration of the dispute and a cessation of the strike, work stoppage and picketing. Upon Respondent's refusal, Petitioner obtained injunctive relief from the California Superior Court.[2] Respondent removed the action to the District Court under the authority of this Court's decision in *Avco Corp. v. Aero Lodge 735, I.A.M.*, 390 U.S. 557 (1968), and

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[2] *The Boys Markets, Inc. etc., plaintiff, v. Retail Clerks Union Local 770, etc., defendant,* Superior Court of the State of California for the County of Los Angeles No. 948323; R. 7-20.

immediately noticed a motion to quash the Temporary Restraining Order. Petitioner made a Motion For an Order Compelling Arbitration; For Specific Performance of Agreement to Arbitrate; and Application For a Preliminary Injunction [R. 81]. The District Court, finding that the dispute between Petitioner and Respondent was required to be submitted to arbitration under the labor agreement and that the strike, picketing and work stoppage was in breach of the contract, denied Respondent's motion to quash; ordered Petitioner and Respondent to arbitrate their dispute; and granted an injunction pending arbitration [R. 106-121]. Respondent was restrained from picketing Petitioner's supermarket; carrying signs stating employees were on strike; engaging in a strike or work stoppage; inducing Petitioner's employees to engage in a strike, work stoppage or picketing or inducing Petitioner's employees to refuse to perform their services; and from informing customers that the store was closed or from blocking ingress or egress of customers or employees of suppliers.

Upon appeal, the Court of Appeals for the Ninth Circuit, noting that this Court's decision in *Sinclair Refining Co. v. Samuel M. Atkinson*, 370 U.S. 195, was "nearly on all fours with the instant case", held that it was "bound by the holding of *Sinclair*" and reversed the judgment of the District Court enjoining the strike and remanded the case for further proceedings.

REASONS FOR GRANTING WRIT.

1. A re-examination of the Court's decision in *Sinclair Refining Co. v. Samuel M. Atkinson,* 370 U.S. 195, is compelled by the Court's more recent decision in *Avco Corp. v. Aero Lodge 735, I.A.M.,* 390 U.S. 557. The *Avco* decision resolved the fundamental question of the jurisdiction of the District Courts under Section 301 of the Labor-Management Relations Act of actions removed from State Courts in which the State Courts had exercised their traditional equity jurisdiction to enjoin strikes by labor organizations in breach of contracts with employers. That decision, however, left unresolved the question of the equity powers of the District Courts after removal of such actions. Another aspect of this issue was raised in *International Longshoremen's Association, Local 1291 v. Philadelphia Marine Trade Association,* 389 U.S. 64, but was not reached for the reason that the case was decided upon other grounds.

2. Since the decision in *Sinclair,* State Courts have continued to exercise equitable jurisdiction to enjoin strikes in violation of labor agreements, and it is fair to say the great majority of such actions for breach of contract have been filed in State Courts. Until the Court's decision in *Avco Corp.,* the lower Federal Courts were divided upon the question whether State Court injunction actions, after removal, should be remanded. Now that it is clear that the District Courts have general jurisdiction under Section 301 of removed injunction actions, it is imperative that the questions, whether the District Courts have original equity jurisdiction to enjoin strikes in breach of contract and whether they have such jurisdiction in removed actions, in which in-

junctive relief has been granted by State Courts, before removal, be finally resolved.

3. The decision in the *Sinclair* case is not in harmony with the federal law of labor relations that the District Courts are required to fashion by *Textile Workers of America v. Lincoln Mills of Alabama*, 353 U.S. 448, and which the State Courts are required to follow under this Court's decision in *Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Co.*, 369 U.S. 95. The federal law of labor relations is best effectuated by a labor agreement between an employer and a union which requires determination of disputes by private arbitration and under which strikes are absolutely prohibited, the arbitration agreement being the *quid pro quo* for the agreement not to strike.[3]

It is essential to the complete effectuation of the federal labor policy that every aspect of such agreements be specifically enforceable in the Courts, including the agreement not to strike as well as the agreement to arbitrate disputes. Under present law, all doubts must be resolved in favor of arbitration, even to the processing of frivolous claims; and the awards of arbitrators will be enforced by judgment of the Courts, even though the Courts might have interpreted the contract in question differently than did the arbitrator.[4]

The agreement to arbitrate is specifically enforceable, even though the promise not to strike has been violated

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[3]See *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 at p. 578, Fn. 4.

[4]*United Steel Workers of America v. American Manufacturing Co.*, 363 U.S. 564; *United Steel Workers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574; *United Steel Workers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593.

by the union seeking arbitration. (*Drake Bakeries, Inc. v. American Bakery & Confectionery Workers International Local 50,* 370 U.S. 254). It would even appear that the Federal Courts may have equitable power to enforce the award of an arbitrator ordering a labor organization to cease and desist from a strike in violation of a contract even though such order would be tantamount to a mandatory injunction.[5]

The rationale of *Sinclair* cannot be reconciled with the policies reflected by these decisions, all of which emphasize the necessity for equal enforcement of the mutual promises of employers and labor organizations in collective bargaining agreements.

4. An injunction is the only efficacious and practical remedy for a strike in defiance of a "no-strike" provision in a collective bargaining agreement which by its terms requires submission to arbitration of the dispute causing the strike. The promise not to strike is the only substantial consideration received by an employer in return for the employer's agreements upon wages, benefits and other conditions of employment under the contract with the labor organization. Unless, in an appropriate case, the agreement not to strike may be swiftly enforced by the equitable remedy of injunctive relief, the consideration received by employers for their labor agreements is valueless and the promise not to strike is rendered meaningless.

Neither the arbitration procedure itself, which is inherently time-consuming, nor the future possibility of a court order enforcing a cease and desist award of

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[5]*New Orleans Steamship Assn. v. General Longshore Workers, ILA, Local Union No. 1418,* (CA-5 1968), 389 F. 2d 369, cert. den., 393 U.S. 828.

an arbitrator or, in fact, the possibility of a damage action at law, provide effective relief for the employer whose business has been shut down by a strike.

5. The policy of the promotion of industrial peace and the substitution of private arbitration for economic warfare can only be completely effectuated by an accommodation of Section 4 of the Norris-La Guardia Act with Section 301 of the Labor-Management Relations Act. The specific problems, which each of these statutes was enacted to remedy, are indeed entirely different. The abuses of the injunctive process which Congress sought to remedy by the enactment of the Norris-LaGuardia Act will not recur by mere reason of the restraint by Courts of strikes in violation of collective bargaining agreements.

Upon re-examination, the legislative history of Section 301 of the Labor-Management Relations Act of 1947 should not be held to preclude the interlacing of this statutory enactment with the Norris-LaGuardia Act. These statutes should not be read in isolation, one from the other, so that the Norris-LaGuardia Act prohibits the equal enforcement of labor-management contracts by equitable relief, as would otherwise be implicit under the provisions of Section 301 and the Congressional purposes underlying the enactment of this statute.

6. There is no logical basis upon which the judicial accommodation between the Norris-Laguardia Act and the Railway Labor Act, reached by this Court in *Brotherhood of Railway Trainmen v. Chicago River and Indiana Railway Co.*, 353 U.S. 30, and in other cases involving the issue under the Railway Labor Act, can be explained or compared with the *Sinclair* case.

If the Norris-LaGuardia Act is indeed a barrier to injunctive relief under Section 301, then it would appear that reason would dictate that that Act also should have barred such relief in "minor dispute" cases arising under the Railway Labor Act. But if it be granted that the *Virginia Railway Company v. System Federation No. 40,* 300 U.S. 515; *Graham v. Brotherhood of Locomotive Firemen,* 338 U.S. 232; *Brotherhood of Railway Trainmen v. Howard,* 343 U.S. 768, and the *Chicago River* cases were correctly decided, these cases would appear to support the ultimate determination that Section 4 of the Norris-LaGuardia Act does not prohibit the granting of injunctive or equitable relief under Section 301 of the Labor-Management Relations Act.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOSEPH M. MCLAUGHLIN,
WILLIAM B. IRVIN,
Counsel for Petitioner, The Boys Markets, Inc.

APPENDIX A

Statutory Provisions Cited in Opinion

1. Section 301, Labor Management Relations Act of 1947, 29 U.S.C. §185.

§ 185. Suits by and against labor organizations.

Power, amount, and citizenship.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; suits for payment of and enforcement of money judgments.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Is the Norris-LaGuardia Act to be interpreted to bar injunctive relief under Section 301 even if it would appear that Congress would intend that that Act also should have barred such relief in "minor disputes" arising under the Railway Labor Act. But if it is granted that the *Virginian Railway Company* and *Pyrich* cases were not correctly decided, there still would appear to exist the ultimate determination that Section 4 of the Norris-LaGuardia Act does not prohibit the granting of injunctive or equitable relief under Section 301 of the Labor-Management Relations Act.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOSEPH M. MCLAUGHLIN,
WILLIAM D. IRVIN,
Counsel for Petitioner, The Stop Shirtail, Inc.

APPENDIX A.

Statutory Provisions Cited and Quoted.

1. Section 301, Labor-Management Relations Act of 1947, 29 U.S.C. §185:

§ 185. *Suits by and against labor organizations—Venue, amount, and citizenship*

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgements

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

2. Section 4, Norris-LaGuardia Act, 29 U.S.C. §104:

§ 104. *Enumeration of specific acts not subject to restraining orders or injunctions*

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from

doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or in prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. Mar. 23, 1932, c. 90, § 4, 47 Stat. 70.

APPENDIX B.

Copies of Findings, Conclusions and Orders of United States District Court for the Central District of California.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

The Boys Markets, Inc., a California corporation, Plaintiff, vs Retail Clerks Union, Local 770, an unincorporated association, Defendant. Civil No. 69-337-CC.

This cause came on to be heard by the Court, the Honorable Charles H. Carr, United States District Judge Presiding, on the 10th day of March, 1969, on the motion of plaintiff for an order compelling arbitration; for specific performance of contract; and for injunction pending arbitration, and on the motion of defendant to quash the Temporary Restraining Order heretofore issued by the Superior Court of the State of California for the County of Los Angeles in Case No. 948323, removed to this Court, and the Court having considered the verified complaint, declaration and memorandum of points and authorities filed by plaintiff in the State Court, the supplemental memorandum of points and authorities and motion filed by plaintiff herein, and the motion of defendant to quash the said Temporary Restraining Order and the memorandum of points and authorities of defendant, and having heard the argument of counsel, finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. Plaintiff, The Boys Markets, Inc., is a corporation duly organized and existing under the laws of the State of California and owns and operates a chain of retail food supermarkets, one of which said supermarkets is located at 7230 Atlantic Boulevard in the City of Cudahy within this District. Plaintiff employs retail clerks in the said supermarket located at 7230 Atlantic Boulevard, Cudahy, California, who are represented for collective bargaining purposes by defendant.

2. Defendant, Retail Clerks Union Local 770, is an unincorporated association functioning as a labor organization, affiliated with the Retail Clerks International Association, AFL-CIO, being composed of several thousand members who are employed as retail clerks in supermarkets, drug stores, discount stores and other retail establishments who are represented for collective bargaining purposes by said labor organization with its principal offices located within this District.

3. Plaintiff and defendant executed and entered into a contract, in writing, known as "Retail Food, Bakery, Candy, and General Merchandise Agreement, April 1, 1964-March 31, 1969", which said contract provided for and established the wages, hours, benefits and conditions of employment for the employees of plaintiff employed as retail clerks in plaintiff's supermarket located at 7230 Atlantic Boulevard, Cudahy, California.

4. Article XIV of said contract, entitled "Adjustment And Arbitration" provides as follows:

"ARTICLE XIV

"ADJUSTMENT AND ARBITRATION

"A. CONTROVERSY, DISPUTE OR DISAGREEMENT. Any and all matters of con-

troversy, dispute or disagreement of any kind or character existing between the parties and arising out of or in any way involving the interpretation or application of the terms of this Agreement, except as may be otherwise provided in Paragraph D of this Article, shall be settled and resolved by the procedures and in the manner hereinafter set forth.

"B. ADJUSTMENT PROCEDURE.

"1. *Store Level.* The Union through its representatives shall attempt to settle or resolve any such matter with the appropriate store supervisor or person designated by the Employer in the manner indicated in Article X of this Agreement.

"2. *Meeting of Representatives.* Upon receipt of a written notice from either party, the representatives of the Employer and the representatives of the Union shall meet within a calendar week and attempt to settle or resolve the matter.

"3. *Food Employers Council, Inc.* The Union hereby recognizes the Food Employers Council, Inc. as the authorized representative of its members in matters pertaining to the negotiation and administration of this Agreement. In the event of a dispute, it shall be the duty of the Employer to notify the Food Employers Council, Inc. of the existing dispute if said Employer desires said Food Employers Council, Inc. to represent it in the dispute. Should a grievance or dispute be settled between the Union and any Employer signatory to this Agreement without the participation of the Food Employers Council, Inc. and if in such settlement, an interpretation of any language or phrase of this Agreement is involved in order that such

settlement be reached, the Union shall, within ten (10) days of such settlement notify Food Employers Council, Inc., in writing of the dispute, the language or the phrase interpreted, the settlement reached, and the date of such settlement. Should the Union fail to notify the Food Employers Council, Inc., as set forth above, the fact of settlement and the interpretation of the language or phrase of the Agreement involved in the settlement shall not be used in evidence for any purpose whatsoever. No such settlement or interpretation shall be binding upon the Food Employers Council, Inc. or its members unless the Council or its members thereof participated in arriving at such settlement or interpretation.

"C. ARBITRATION.

"1. Any matter not satisfactorily settled or resolved in Paragraph B hereinabove shall be submitted to arbitration for final determination upon written demand of either party. The written demand for arbitration may be made at any time after the expiration of fifteen (15) days from the date of the notice, submitting the matter under Paragraph B, subsection 2, hereinabove, to the meeting of representatives.

"2. The representatives of the Union and the representatives of the Employer shall meet for the purpose of selecting an impartial arbitrator within the ten (10) day period following the demand for arbitration. If no agreement upon an arbitrator is reached during this period, either party may then request a list of fifteen (15) persons qualified to act as arbitrators under this

Agreement, from the Federal Mediation and Conciliation Service and upon receipt of this list the parties shall immediately thereafter select the arbitrator by alternately striking names from the list until the last name remains. The parties shall draw lots to determine who shall make the first deletion from the list.

"3. Should either party desire, a board of arbitration shall be convened in lieu of a single arbitrator, consisting of an equal number of arbitrators appointed by each party (not to exceed two appointed by each) and the impartial arbitrator who shall be chairman. The board shall hear and determine the matter by majority vote of the members of the board.

"4. The arbitrator or board of arbitration shall be empowered to hear and determine the matter in question and the determination shall be final and binding upon the parties, subject only to their rights under law. The hearings shall be held within thirty (30) days after the selection of the arbitrator, or board, which shall have the power to decide the date or dates upon which the arbitration is to be held if agreement cannot be reached by the parties.

"D. POWERS, LIMITATIONS AND RESERVATIONS.

"1. *Arbitrator.* The arbitrator or board of arbitration shall not have the authority to decide questions involving the jurisdiction of any local, or of the International, or which may in any way affect or change the Union Security clause, nor shall the arbitrator or board of arbitration have

the authority to effect a change in, modify, or amend any of the provisions of this Agreement, or to make decisions on provisions covering wages or working conditions to be incorporated either in a new agreement or any subsequent annual agreement. If a question of the arbitrability of an issue is raised by either party, such question shall be determined in the first instance by the arbitrator or board. Neither party to this Agreement shall refuse to proceed to arbitration upon the grounds that the matter in question is not arbitrable.

"2. *Work Stoppages.* Matter subject to the procedures of this Article shall be settled and resolved in the manner provided herein. During the term of this Agreement, there shall be no cessation or stoppage of work, lock-out, picketing or boycotts, except that this limitation shall not be binding upon either party hereto if the other party refuses to perform any obligation under this Article or refuses or fails to abide by, accept or perform a decision or award of an arbitrator or board.

"3. *Wage Claims.* In the case of a direct wage claim or a claim for contributions to employee benefit plans which does not involve an interpretation of any of the provisions of this Agreement, either party may submit such claim for settlement to either the grievance procedure provided for herein or to any other tribunal or agency which is authorized and empowered to effect such a settlement.

"E. STATUS QUO. During the period of adjustment or arbitration as provided in this Article, the conditions in effect at the time of receipt of

written notice, specified in Paragraph C above, shall continue in effect pending final decision.

"F. EXPENSES. The expenses of the arbitrator shall be borne equally by both the Employer and the Union.

"G. TIME LIMITS. The time limits set forth above may be extended by mutual agreement between the parties.

"H. REPORTING DISCREPANCIES. It shall be the responsibility of the employee to report any claimed discrepancy to the Union promptly upon discovery, and it shall then become the responsibility of the Union to notify the Employer promptly of such claimed discrepancy. In any event, all complaints must be filed in writing within thirty (30) days after the matter in dispute or disagreement is first reported to the Union. Complaints not filed within the limits herein specified shall be deemed null and void."

5. Plaintiff and defendant became involved in a controversy, dispute and disagreement concerning the performance of certain work in plaintiff's supermarket located at 7230 Atlantic Boulevard, Cudahy, California, on Tuesday, February 18, 1969. Defendant objected to the method used by plaintiff in relocating certain merchandise within frozen food cases located in said store, and defendant demanded that plaintiff require employees represented by defendant to remove all merchandise from said frozen food cases, return said merchandise to the main freezer in the backroom of the store and thereafter restock all of said merchandise in the said frozen food cases. Defendant threatened that unless plaintiff

agreed to such demands, defendant would cause a strike and work stoppage against plaintiff.

6. Plaintiff refused to agree to the demands made by defendant. Thereafter, on February 18, 1969, defendant and its representatives ordered, instructed and required all of the retail clerks employed by plaintiff in said store to leave their employment to engage in a strike and work stoppage against plaintiff. Plaintiff's employees, acting under and pursuant to defendant's instructions, ceased to perform their work for plaintiff and engaged in a strike and work stoppage against plaintiff. Defendant established a picket line on and about the premises of plaintiff's store, and defendant's pickets carried signs reading,

"LOCAL 770
THIS STORE ON STRIKE
PLEASE RESPECT OUR PICKET LINES"

Said strike, work stoppage and picketing continued until defendant was served with a Temporary Restraining Order issued by the Superior Court of the State of California for the County of Los Angeles in Case No. 948323.

7. On February 18, 1969, plaintiff caused a telegram to be sent to defendant demanding that the dispute be submitted to arbitration and that defendant cease and desist from the strike and work stoppage. Defendant failed and refused to agree to arbitrate the said dispute or to end its strike, picketing and work stoppage.

8. Unless defendant is enjoined and restrained from continuing to engage in the strike, picketing and work stoppage, it may be reasonably expected that plaintiff will suffer substantial and serious loss of business and

customer patronage to plaintiff's substantial and irreparable injury and damage in excess of such damage as plaintiff may have already suffered, and greater injury will be inflicted upon plaintiff by the denial of relief than will be inflicted upon defendant by the granting of such relief.

9. It is impossible for plaintiff to ascertain the exact amount of damage and injury which plaintiff will sustain if defendant and its members are not enjoined from committing such acts, and plaintiff has no adequate remedy at law.

CONCLUSIONS OF LAW

1. Plaintiff and defendant are parties to a valid existing collective bargaining agreement, in writing, effective through March 31, 1969, which by its terms requires that any and all matters of controversy, dispute or diagreement of any kind or character existing between the parties and arising out of or in any way involving the interpretation or application of the terms of said contract shall be submitted to arbitration for final and binding determination of the merits of such controversy, dispute or disagreement, and which contract further provides that defendant and its members shall not engage in any cessation or stoppage of work or picketing by reason of any matter subject to the arbitration procedures of the contract.

2. During the term of said contract, plaintiff and defendant became engaged in a controversy, dispute or disagreement concerning the stocking of frozen food cases at plaintiff's store located at 7230 Atlantic Boulevard, Cudahy, California. Said controversy, dispute or disagreement was of a type and character required by

the terms of the said contract to be submitted to arbitration for final and binding determination.

3. Defendant, and members of defendant employed by plaintiff, engaged in a strike, picketing and work stoppage commencing on February 18, 1969, in substantial and material breach and violation of the contract between plaintiff and defendant.

4. Plaintiff has no plain, speedy or adequate remedy at law.

5. The Court has jurisdiction over plaintiff's cause and the relief sought thereunder by plaintiff under the provisions of Title 29, United States Code, Section 185.

6. Plaintiff's motion for an order compelling defendant to arbitrate the said controversy, dispute or disagreement must be granted.

7. Plaintiff's motion and application for injunction enjoining and restraining defendant and its members from engaging in a strike, picketing and work stoppage at plaintiff's store located at 7230 Atlantic Boulevard, Cudahy, California, pending submission of the aforesaid controversy, dispute or disagreement to arbitration, must be granted.

8. Defendant's motion to quash the Temporary Restraining Order, issued by the Superior Court of the State of California for the County of Los Angeles in Case No. 948323, must be denied.

Dated: March 12, 1969.

/s/ Charles H. Carr
United States District Judge

Approved as to form: Arnold, Smith & Schwartz By /s/ ROBERT M. DOHRMANN Attorneys for Defendant.

Order Directing That Arbitration Proceed and Order Granting Injunction Pending Arbitration.

United States District Court, Central District of California.

The Boys Markets, Inc., a California corporation, Plaintiff, vs Retail Clerks Union, Local 770, an unincorporated association, Defendant. Civil No. 69-337-CC.

This cause came on to be heard by the Court, the Honorable Charles H. Carr, United States District Judge Presiding, on the 10th day of March, 1969, on the motion of plaintiff for an order compelling arbitration; for specific performance of contract; and for injunction pending arbitration, and on the motion of defendant to quash the Temporary Restraining Order heretofore issued by the Superior Court of the State of California for the County of Los Angeles in Case No. 948323, said action having been removed to this Court. Plaintiff, appearing by its counsel, Law Offices of Joseph M. McLaughlin, by William B. Irvin, Esq., and defendant appearing by its counsel, Arnold, Smith & Schwartz, by Gerald A. W. Haight, Esq. The Court having considered the verified complaint of plaintiff, declaration, memorandum of points and authorities filed by plaintiff in the State Court, the supplemental memorandum of points and authorities and motion filed by plaintiff herein and the motion of defendant to quash the said Temporary Restraining Order and the memorandum of points and authorities of defendant, and having heard the argument of counsel, and it appearing to the Court after due deliberation that plaintiff and defendant are parties to a valid and existing collective bargaining agreement in writing; that said contract requires that any and all matters of controversy, dispute and disagree-

ment of any kind or character existing between the parties and arising out of or in any way involving the interpretation or application of the terms of said contract shall be submitted to final and binding arbitration; that defendant under and pursuant to the terms and provisions of said contract promised, covenanted and agreed that the Union and its members, employees of plaintiff, would not engage in any strike, work stoppage or other concerted activity against plaintiff upon or by reason of any controversy, dispute or disagreement required by said contract to be submitted to arbitration; that plaintiff and defendant are engaged in a controversy, dispute or disagreement arising out of and involving the interpretation or application of the provisions of their said contract relating to the performance of certain work within plaintiff's store, and that said controversy, dispute or disagreement is of the kind or character required by the said contract to be submitted to an impartial arbitrator for binding determination; that defendant, in breach of the terms and provisions of its said contract, engaged in a strike against plaintiff and induced, encouraged and persuaded plaintiff's employees to cease performing their work for plaintiff and to engage in a strike and work stoppage, and that by reason of the acts committed by defendant, plaintiff has suffered irreparable injury and will continue to suffer irreparable injury unless defendant is enjoined and restrained from committing the said acts.

It further appearing to the Court that the Court has jurisdiction of the subject matter of the action and to grant the relief sought by plaintiff under Title 29, United States Code, Section 185, and good cause appearing therefor:

IT IS ORDERED that the controversy, dispute or disagreement between plaintiff and defendant relating to or concerning the performance of work in and upon the frozen food display cases in plaintiff's market located at 7230 Atlantic Boulevard, Cudahy, California, be submitted to arbitration in accordance with the terms and provisions of Article XIV of the contract between plaintiff and defendant, known as "Retail Food, Bakery, Candy, and General Merchandise Agreement, April 1, 1964—March 31, 1969", and that plaintiff and defendant proceed with diligence so that said arbitration shall be completed and the decision and award of the arbitrator rendered within sixty (60) days of the date of this order or within such further time as may be necessarily required under the circumstances.

IT IS FURTHER ORDERED that defendant, its officers, agents, representatives, members, employees, and each of them, and all persons acting in aid or in concert with defendant, be and they hereby are enjoined and restrained, pending the decision and award of the impartial arbitrator, from doing or attempting to do, or threatening to do, and from causing to be done, either directly or indirectly, by any means, method or device whatsoever, any and all of the following acts in connection with, related to or in furtherance of a strike or work stoppage against plaintiff involving the pending dispute as to the stocking of frozen foods:

(a) Picketing at, around or in the vicinity of the premises of plaintiff's retail supermarket located at 7230 Atlantic Boulevard in the City of Cudahy, County of Los Angeles, State of California, or any other supermarket of plaintiff.

(b) Carrying or displaying signs or placards which state in any manner that plaintiff's employees are on strike or requesting in any manner customers or potential customers not to patronize plaintiff or its supermarkets, or which, in any manner, infer that a strike or labor dispute against or involving plaintiff is in progress.

(c) Engaging in any strike, concerted work stoppage or other economic activity at or about the premises of plaintiff's retail store located at 7230 Atlantic Boulevard in the City of Cudahy, County of Los Angeles, California, or at any other supermarket of plaintiff.

(d) Inducing, instructing, persuading or encouraging plaintiff's employees, or any of them, to engage in a strike, work stoppage, picketing or other economic activity against plaintiff or to fail or refuse to perform their work and services in a regular and normal manner for plaintiff.

(e) From stating to or informing customers or potential customers of plaintiff that plaintiff's employees are on strike or that plaintiff's store at 7230 Atlantic Boulevard in Cudahy, California, is closed or that there is no service in plaintiff's food store or from in any manner persuading, inducing or encouraging or attempting to persuade, induce or encourage plaintiff's customers or potential customers not to patronize plaintiff or to patronize plaintiff's competitors.

(f) From blocking, obstructing or impeding or attempting to block, obstruct or impede the ingress or egress of customers and potential customers to and from plaintiffs said store or at any other supermarket of plaintiff.

(g) From intimidating, inducing, persuading or encouraging or attempting to intimidate, induce, persuade or encourage employees of suppliers of plaintiff to refuse to deliver goods and merchandise to plaintiff's said store.

The foregoing Order for Injunction shall be effective when plaintiff has given security in the sum of $1,000.00 corporate surety bond.

IT IS FURTHER ORDERED that defendant's motion to quash Superior Court Temporary Restraining Order be and hereby is denied.

Dated: March 12, 1969.

/s/ Charles H. Carr
United States District Judge

Approved as to Form: Arnold, Smith & Schwartz By /s/ Robert M. Dohrmann, Attorneys for Defendant.

APPENDIX C.

Copies of Opinion and Judgment of United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

The Boys Markets, Inc., *Appellee*, vs. Retail Clerk's Union, Local 770, *Appellant*. No. 24,004.

[September 26, 1969]

Appeal from the United States District Court for the Central District of California.

Before: HAMLIN and DUNIWAY, Circuit Judges, and SMITH, District Judge*

HAMLIN, Circuit Judge

The Boys Markets, Inc., appellee herein, filed an action in California state court against the Retail Clerk's Union, Local 770, appellant herein, seeking to enjoin a strike being carried on by appellant against appellee and seeking an order for specific performance of an agreement to arbitrate. Appellant and appellee had prior thereto entered into a collective bargaining agreement which provided for arbitration of all disputes involving the interpretation of the agreement and which also contained a promise by appellant not to engage in any strike or work stoppage or any other concerted economic activity. This agreement was in effect at the time the strike was called by the appellant.

The California court issued a temporary injunction restraining the Union from striking. The Union then removed the case to the United States District Court for

*Honorable Russell E. Smith, United States District Judge, Missoula, Montana, sitting by designation.

the Central District of California, and sought to quash the injunction. After a hearing the district court issued its order enjoining the Union from striking and ordered the parties to arbitrate the dispute which had given rise to the strike. The Union appealed to this court from the district court's order. We have jurisdiction under 28 U.S.C. § 1291.

This case involves the interplay of two of the major statutes in the area of labor law, section 4 of the Norris-LaGuardia Act (29 U.S.C. §104) and section 301 of the Labor-Management Relations Act (29 U.S.C. § 185). Section 301 provides:

> "Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States.

The landmark *Lincoln Mills* decision, 353 U.S. 448 (1957), held that section 301 was not merely procedural, but rather it gave to the federal courts power to establish a body of substantive federal law. A normal adjunct of federal power, of course, is the equitable remedy of an injunction.

However, section 4 of the Norris-LaGuardia Act deprives the federal courts of jurisdiction to issue injunctions against strikes or work stoppages in most cases growing out of a labor dispute. The strike action taken by the Union in the instant case falls squarely within the proscription of section 4; this much is conceded by the appellee. The appellee's contention, which was upheld by the court below, is that section 4 does not forbid a federal court to issue an injunction where the union strike is in violation of a no-strike clause. Thus, the sole question on this appeal is whether the court

below had jurisdiction to enjoin a strike where that strike is in violation of a no-strike clause.

This question has previously been answered in favor of the Union by the Supreme Court in *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195 (1962). *Sinclair* is nearly on all fours with the instant case: the employer there was attempting to enjoin a union strike where the union struck in violation of a no-strike clause. Many of the policy arguments presented by the appellee in this case were addressed to the Court in *Sinclair.* However, the Court held that it was bound by the clear language of section 4 of the Norris-LaGuardia Act, and that a federal court does not have power to enjoin a strike in most cases growing out of a labor dispute, even where that strike is in violation of a no-strike clause. See also. *A. H. Bull Steamship Co. v. Seafarers' International Union,* 250 F.2d 326 (2nd Cir. 1957); *General Electric Co. v. Local Union 191,* .... F.2d ...., 71 LRRM 2903, (5th Cir. 1969).

We see nothing in *Avco Corp. v. Aero Lodge No. 735,* 390 U.S. 557 (1968), relied on by appellee, which would permit us not to follow the holding in *Sinclair.* The question decided in *Avco* was whether, after the union has petitioned for removal of an action brought by the employer in state court, the employer can remand the case to state court. The Court held that the employer could not remand the case to state court. The underlying facts of the dispute in *Avco* were very similar to the facts in *Sinclair* and the instant case, but the Court

reserved consideration of the *Sinclair* question. This court therefore remains bound by the holding of *Sinclair*.[1]

Appellee's reliance upon *International Longshoremen's Assn. Local 1291 v. Philadelphia Marine Trade Assn.*, 389 U.S. 64 (1968), and *New Orleans Steamship Assn. v. General Longshore Workers*, 389 F.2d 369 (5th Cir.), cert. denied, 393 U.S. 828 (1968), is misplaced. In each of these cases the order of the court was made after an arbitration award had been made. In the *Philadelphia Marine* case, the complaint had alleged that the union had refused "to abide by the terms of the arbitrator's award" and prayed for an order enforcing the arbitrator's award. In that case the Supreme Court set aside the order of the district court enforcing the award as being too vague.

In the *New Orleans Steamship Association* case, an arbitration award had been made and the action was by the Steamship Association seeking an order to enforce the award of the arbitrator. The court of appeals held that the district court had jurisdiction to enforce the award and that it erred in dismissing the complaint.

In the instant case no arbitration award has been made, and the *Sinclair* case is controlling. Accordingly, we reverse the judgment of the district court enjoining appellant's strike and remand the case for further proceedings.

---

[1]It is worthy of note that although the Supreme Court in *Sinclair* made it clear that Congress alone could change the result reached by the Court in that case, Congress has not yet seen fit to do so.

Judgment.

United States Court of Appeals, for the Ninth Circuit.

The Boys Markets, Inc., Appellee, vs. Retail Clerk's Union, Local 770, Appellant. No. 24004.

APPEAL from the United States District Court for the Central District of California.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed and that this cause be and hereby is remanded to the said District Court for further proceedings in accordance with the opinion of this Court.

Filed and entered September 26, 1969.

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IN THE

Supreme Court of the United States

October Term, 1969
No. 768

THE BOYS MARKETS, INC.,

Petitioner,

vs.

RETAIL CLERK'S UNION, LOCAL 770,

Respondent.

Amicus Curiae Brief of Plumbing-Heating and Piping Employers Council of Southern California, Inc.

I.
Interest of the Amicus Curiae and Preliminary Statement.

Plumbing-Heating and Piping Employers Council of Southern California, Inc. (hereinafter referred to as the "Plumbing Council") is a California non-profit corporation engaged in representing approximately 328 employers in the plumbing industry in the nine southern counties in the State of California. Together these member-employers employ approximately 6,000 employees or an estimated one-half of the plumbers engaged in business in Southern California.

This Brief is filed upon the written consent of the parties and pursuant to Rule 42(2) of the Revised Rules of the Supreme Court of the United States. This *Amicus Curiae* has an interest in this case in that its member-employers, have for many years collectively engaged in multi-employer bargaining and have been and are now parties to collective bargaining agreements that in pertinent respects are the same or similar to the Agreement in the instant action. The Plumbing Council has repeatedly found it necessary to enforce the provisions of these agreements through the injunctive process in numerous State courts in California.

The decision of the Court of Appeals for the Ninth Circuit is of particular and vital importance to the members of the Plumbing Council in that it adversely affects the stability of labor management relations and upsets, contrary to the intention of the parties, the expectation of the parties in entering into existing collective bargaining agreements. The decision of the court below creates a substuntive law which is national in its scope and will, therefore, have a detrimental effect upon the sound and efficient operations of the members of the Plumbing Council and is clearly at odds with the longstanding case law in the State of California (and other states) which has enabled the parties to engage in meaningful collective bargaining and mutual responsibility. The decision of the court below creates an unjustified "no man's land" or "rule of the jungle" which has never been sanctioned or favored either by Congress or by this Court.

It is the intention of your *Amicus* to devote this Brief to the discussion of the second question presented by the Petitioner herein, to wit:

> "Whether the United States District Courts are compelled, after removal of an action from a State court in which an injunction was granted against a labor organization, to dissolve such injunction because of the command of Section 4 of the Norris-LaGuardia Act."

To some extent it will be necessary to make reference and to touch upon the reasons raised by the other questions presented by Petitioner to this Court.

ARGUMENT IN SUPPORT OF REASONS.

I.

The decision of the court below wrongfully but effectively precludes the issuance of State court injunctive relief in breach of contract situations; such a result is anathema to stable labor relations and contrary to the intention of Congress. The District Court below, among other things, denied the union's motion to quash the injunction against the union for breach of its contract with Petitioner issued by the Superior Court of the State of California prior to removal of the cause of the Federal District Court, Central District of California (Pet. Br. App. B). On appeal from this judgment the Court of Appeals for the Ninth Circuit reversed the judgment of the District Court. In so acting the Circuit Court of Appeals has, in effect, established a rule of law in interpreting the relationship between Section 301 of the Labor-Management Relations Act of 1947 and the scope of Section 4 of the Norris-LaGuardia Act which is totally unjustified and has serious implications to labor stability in the State of California and throughout the United States. Moreover, contrary to the assumption of the Court of Appeals, this Court has never held, and certainly not in *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195 (1962) nor in *Avco Corp. v. Aero Lodge 735, I.A.M.,* 390 U.S. 557 (1968), that the combination of Section 301 of the Labor-Management Relations Act and Section 4 of the Norris-LaGuardia Act precludes a State court from exercising traditional equity jurisdiction to enjoin strikes by labor organizations in breach of contracts with employers or to require that when injunctions are given by State courts in these situations, a federal dis-

trict court to which the action has been removed, is compelled to dissolve such an injunction. Indeed, this court in *Avco* specifically recognized that it was reserving decisions on such questions (390 U.S. at 561, fn. 4). The instant case squarely presents these very important questions.

Congress, in enacting Section 301, clearly never intended to revoke the power of state courts to enjoin breaches of collective bargining agreements. The legislative history of the enactment of Section 301 not only underscores this fact but clearly shows that Congress was cognizant that many states were exercising the traditional powers of equity to enjoin contract violations and that some states had specifically enacted their own laws to secure union responsibility for breaches of no-strike provisions in their contracts. I Leg. His. of the Labor-Management Relations Act 423-24 (1947). Indeed, one Senate bill (No. 1126) originally contemplated that states would no longer have the power to enjoin contract violations on the premise that states should not act in those areas where the N.L.R.B. has asserted jurisdiction. In the end, however, Congress—with full knowledge that a number of states granted injunctive relief—decided that these situations should be "left to the usual processes of the law." *Ibid.* This court in *Dowd Box Co. v. Courtney,* 388 U.S. 502 (1962) recognized that the legislative history of Section 301 clearly testifies to the fact that Congress intended to permit state courts to exercise all their then present rights to adjudicate disputes between parties in relation to labor agreements and that Congress did not intend to take any jurisdiction away from state courts.

This Court has subsequently recognized not only the need to accommodate Section 301 to state court practices but to continue to permit state courts to exercise their traditional authority in this area unless such jurisdictional action undermines the intent of Congress in enacting Section 301. *Cf. International Union v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966); *C. D. Draucker, Inc. v. International Union of Operating Engineers*, 350 F. 2d 936 (1965), *cert. den.*, 384 U.S. 904 (1966).

In the face of the recognized legislative history how could it reasonably be contended that Section 301 denies state courts the power to grant injunctive relief? And, if federal courts must automatically dissolve state court injunctions when the cases are removed, this would be the effect. It must be emphasized that the Norris-LaGuardia Act, which is clearly addressed solely to the federal judiciary and is limited to prohibiting federal courts from *issuing* injunctions, can only reach the state judiciary (if it can do so at all) indirectly through Section 301. It cannot travel the long journey by its own strength alone.

The decision of the Court of Appeals in the instant case is clearly in conflict with the holding of the Court of Appeals for the Fifth Circuit in *New Orleans Steamship Association v. General Longshore Workers, ILA, Local Union*, 389 F. 2d 369 (5th Cir., 1958), *cert. den.* 393 U.S. 828. In that case an arbitration award directed the unions and their members to desist from work stoppages; these stoppages, however, continued.

The Fifth Circuit held that federal courts had jurisdiction to enforce the award, even though admittedly the "end result is the same" as granting an ordinary injunction. The Court thought the logic of the national arbitration policy required this, "otherwise one of the parties to a collective bargaining agreement containing arbitration and no-strike or work stoppage clauses has a hollow right indeed."

In the present situation, also, an employer has a "hollow right" if he may not secure help from a state court to enjoin that which the union has freely consented to when it entered into the collective bargaining agreement.

There is no difference in law, substance or equity between the instant circumstance and that presented in *New Orleans Steamship Association.* In both, an injunction is issued against a breach of the contract. In the latter the federal court actually issues an injunction against a strike or work stoppage in the guise of enforcing an arbitration award. In the former the injunction has already been granted by the state court. The federal court is required to do nothing; it merely declines to take any action.

Surely, if in the one case, it is said that the Norris-LaGuardia Act does not proscribe the positive action of the federal court, how may it be contended that it prohibits its negative action?

The dissenting opinion in *Sinclair* cited what it terms a leading state decision holding that states remain free

to apply their injunctive remedies against concerted activities in breach of contract, *McCarroll v. L.A. County Dist. Council*, 49 Cal. 2d 45, 315 P. 2d 322 (1957). In that case Justice Traynor speaking for the California Supreme Court, after reviewing *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) stated:

> "State Courts therefore have concurrent jurisdiction with federal courts over actions that can be brought in the federal courts under section 301. It is obvious that in exercising this jurisdiction state courts are no longer free to apply state law, but must apply the federal law of collective bargaining agreements, otherwise the scope of the litigants' rights will depend on the accident of the forum in which the action is brought. . . .
>
> "It can be argued that since federal courts in actions brought under 301 cannot enjoin strikes in breach of a collective bargaining agreement because of the prohibitions of the Norris-LaGuardia Act (citation), state courts enforcing rights created by 301 likewise cannot issue an injunction and give a remedy not available in the federal courts. . . .
>
> "If it is assumed that federal courts cannot enjoin strikes in actions under section 301 save in compliance with the strict requirements of the Norris-LaGuardia Act, state courts enforcing federal rights are not necessarily subject to the same restraint. In the first place it is not entirely clear that Congress can compel a state court to withhold a remedy that would be available if the action arose under a contract law of the state. Congress can compel a state court to enforce a federal right and give a prescribed remedy when it is essential to

the full realization of the right, and the state court would be competent under its own law to give a remedy of like character for a right based on state law. . . .

"A state court enforcing a federal right is not simply another federal court. . . .

"The difficulties that inhere in the question of congressional power to control equitable remedies available in state courts strengthen our conviction that, whether or not Congress could deprive state courts of the power to give such remedies when enforcing collective bargaining agreements, it has not attempted to do so either in the Norris-LaGuardia Act or section 301.

"The Norris-LaGuardia Act is in terms drawn as a limitation on the courts of the United States. . . . The statute aimed to restrict the federal equity power, and was justified constitutionally on the basis of Congress' power to regulate the jurisdiction of the federal courts. . . . *It did not limit the remedial power of the state courts . . . and could not constitutionally have done so since its prohibition was not restricted to injunctions in labor disputes affecting interstate commerce or any other subject over which Congress has paramount power.* (Emphasis added).

"Section 301 of the Labor Management Relations Act does not embody any policy that requires a state court enforcing rights created by that section to withhold injunctive relief. The principal purpose of section 301 was to facilitate the enforcement of collective bargaining agreements by making unions suable as entities in the federal courts, and there-

by to remedy the one-sided character of existing labor legislation. *We would give altogether too ironic a twist to this purpose if we held that the actual effect of the legislation was to abolish in state court equitable remedies that had been available, and leave an employer in a worse position in respect to the effective enforcement of his contract than he was before the enactment of section 301* (emphasis added).

"Nothing in the nature of the rights created by section 301 requires that injunctive relief be denied in their enforcement. . . .

"Finally, there is no invariable requirement, implicit in the federal system, that a state court enforcing a federal right must not go beyond the remedies available in a federal court. Uniformity in the determination of the substantive federal right itself is no doubt a necessity, but such uniformity is not threatened because a state court can give a more complete and effective remedy."

Justice Traynor's well-reasoned opinion was clearly ignored by the Ninth Circuit; yet the *McCarroll* case logically should be adopted by this court.

Conclusion.

In enacting Section 301, Congress has done nothing to interfere with a state's traditional equity power to enjoin a breach of collective bargaining agreement. If the suite is transferred to a federal district court, the latter is not called upon to take any action in excess of its authority. To the contrary, all it has to do is merely decline to interfere with the already existing state in-

junction. This is in keeping with federal-state concurrent jurisdiction, as discussed above. This absence of judicial action does not in any way conflict with the prohibitions of the Norris-LaGuardia Act. Finally, the resultant enforcing of the terms of the collective bargaining agreement is exactly the purpose that Congress had in mind when it enacted Section 301. The decision of the Court of Appeals for the Ninth Circuit erroneously failed to recognize or adopt these precepts.

Respectfully submitted,

HILL, FARRER & BURRILL,
CARL M. GOULD,
STANLEY E. TOBIN,
By STANLEY E. TOBIN,
Attorneys for Amicus Curiae.

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IN THE

Supreme Court of the United States

October Term, 1969
No. .....

THE BOYS MARKETS, INC.,

Petitioner,

vs.

RETAIL CLERKS UNION, LOCAL 770,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

Statement of Issues.

1. Whether Section 4 of the Norris-LaGuardia Act prohibits the Federal Courts from enjoining peaceful picketing activity in a labor dispute notwithstanding the existence of a "no strike" clause in a binding labor agreement?

2. Whether the decision in *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), should be affirmed?

II.

Statement of the Case.

For clarity in this brief, the respondent will be referred to as "the Union" and petitioner as "the Employer" throughout. References to Arabic numerals in

parentheses are to the page numbers of the Transcript of Record, Volume One, (filed with the Circuit Court June 12, 1969).

On February 19, 1969, the Employer filed a complaint for injunctive relief and for specific performance of an agreement to arbitrate in the Superior Court of the State of California [7-16]. The complaint alleged that there existed between the parties a five (5) year collective bargaining agreement covering the period April 1, 1964, through March 31, 1969, containing, among other covenants, a promise of the Union that it would not engage in any strike, work stoppage or other concerted economic activity for the term of the agreement [8]. The complaint further alleged that on February 18, the Union members employed in the Employer's Cudahy Store objecting to the assignment by the employer of certain work to non-union members, engaged in a strike and work stoppage and picketed the store with signs informing the public that the Union was "on strike" [11].

On the same day, the Superior Court issued a temporary restraining order upon the Employer's request against striking, picketing or other forms of work stoppages pending a hearing on order to show cause to be held March 5, 1969 [17-20].

On February 20, 1969, the Union filed its petition for removal with the District Court [2-5]. On February 25, 1969, the Union filed with the District Court a notice of motion to quash the temporary restraining order on February 19, 1969, by the State Court. Hearing on the motion was set for March 10, 1969 [80].

On March 3, 1969, the Employer filed its motion and application for orders compelling arbitration and enjoining conduct which had been enjoined by the State Court temporary restraining order [81-82]. On March 10, 1969, a hearing was held on both motions. After argument, the District Court directed counsel for the Employer to prepare an order directing that arbitration proceed and granting injunctive relief pending arbitration. The order was filed and entered on March 13, 1969 [106-110].

In granting injunctive relief, the Court specifically enjoined and restrained the Union, pending the outcome of arbitration, from picketing or engaging in strikes or work stoppages or in inducing others to do so [108-110]. The findings of fact and conclusions of law filed the same date [112-120] recite that, based upon the Employer's complaint which was attached to the removal petition and upon the memoranda of points and authorities, irreparable injury would occur to the Employer unless the Union was restrained from engaging "in the strike, picketing and work stoppage. . . ." [119]. The Court concluded as a matter of law that the injunction "must be granted," [120] and thereafter an appeal was taken.

The Court of Appeals for the Ninth Circuit on September 26, 1969 reversed, holding that this Court's decision in *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195, was "nearly on all fours with the instant case," and that it was "bound by the holding of *Sinclair.*" (.... F. 2d ....). Reversing the judgment of the District Court, it quashed the injunction and remanded the case for further proceedings.

III.

Reasons for Denying Writ.

1. A re-examination of the Court's decision in *Sinclair Refining Co. v. Atkinson, supra,* is not required by the Court's recent decision in *Avco Corp. v. Aero Lodge 735, IAM,* 390 U.S. 557. The United States Supreme Court has, in its decisions in *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195 (1962), and *Avco Corp. v. Aero Lodge 735,* 390 U.S. 557 (1968), clearly held that Section 4 of the Norris-LaGuardia Act, 39 U.S.C. §104, prohibits the issuance of an injunction against work stoppages and picketing in a labor dispute and that—whether or not State Courts are free to issue such injunctions—upon the filing of a proper petition for removal, subject matter jurisdiction may be transferred from the State Court to the Federal Courts for all purposes. The Supreme Court in the *Avco* decision, *supra,* clarified the important question of whether or not the Federal District Courts were deprived of removal jurisdiction where, in a labor dispute, injunctive relief was sought by an Employer in a State Court. The Court held that an action based upon the violation of a no-strike clause of a collective bargaining agreement was a claim arising under the laws of the United States within the original jurisdiction of the Federal District Courts and, therefore, removable from the State Courts (390 U.S. 557). The right of removal is not abrogated by the collateral statute, Section 4 of the Norris-LaGuardia Act, since Section 4 deprives Federal Courts of equity jurisdiction and not original jurisdiction. That is, Section 4 merely deprives the Federal Courts of the authority to issue an injunction in labor disputes; it does not deprive them of subject matter jurisdiction

over labor disputes in general. In *Avco, supra,* the Supreme Court repudiated the notion that a "State created right" existed throughout the policy of national labor law.

The Supreme Court in *Avco, supra,* stated that it "is not clear" whether the Federal District Court, after removal, dissolved the State Court injunction "because it felt that action was required by *Sinclair* . . . or because of its equity powers or both. . . ." [390 U.S. 557, 561 N. 4 (1968)]. The Court may be here suggesting that, in addition to Section 4, there may be other grounds for dissolution of the injunction under the basic equity powers possessed by the District Court. This language should not be construed to empower the Court to do that under its basic equity powers which it cannot do in contravention of the statute. The object of Federal question jurisdiction, whether original or on removal, is to assure the opportunity for adjudication of a Federal right in a Federal Court. To determine a Federal right differently in one case than in another would totally defeat the object. In *General Electric Co. v. Local Union 191,* 413 F. 2d 964 (5th Cir. 1969), the Court of Appeals in dissolving a State Court injunction under similar circumstances held:

> "We are of the view that the District Court did not err in dissolving the injunction, not because either *Sinclair, supra,* or *Avco, supra,* explicitly dictates that result, but because, in our view, once this case was removed, a failure to dissolve the State Court injunction would have been tantamount to issuance of that same injunction by the Federal District Court, which, as we have just noted, would be proscribed by the Norris-LaGuardia Act under the *Sinclair* decision." (413 F. 2d 964, 966).

For a similar holding, see *Day-Brite Lighting Division v. IBEW*, ... F. 2d ....., (D.C. No. Miss. August 25, 1969).

2. Under the *quid pro quo* doctrine, the Employer promises to arbitrate in exchange for the employee's promise not to strike. Under this doctrine, injunction is not an exclusive remedy. The flexibility of this doctrine was alluded to in *Drake Bakeries, Inc. v. American Bakery & Confectionary Workers Int'l. Local 50*, 370 U.S. 254 (1962), wherein the Supreme Court held:

> "We do not understand the opinions in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455, or *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567, to enunciate a flat and general rule that these two clauses are properly to be regarded as exact counterweights in every industrial setting. . . ." (370 U.S. 254, 261 N.7).

The Employer is free under most labor agreements to discharge or discipline the strikers and their leaders. In addition, suit may be brought against the Union to recover the damages caused by an illegal strike which it authorized or for which it is otherwise responsible. Thus, the injunction is not the only efficacious and practical remedy for a strike in defiance of a no-strike provision. Unions are as fearful as are other institutions of the risk of a judgment for damages which may empty or deplete their treasuries.

3. The legislative history of Section 4 of the Norris-LaGuardia Act should restrain any judicial tampering with the effect and plain meaning of the Norris-LaGuardia Act. Whenever Congress has wished to relax the application of Norris-LaGuardia, it has expressed

its intention explictly. Section 301 of the LMRA contains no specific repeal; on the contrary, its legislative history shows clearly that Congress considered and rejected the possibility of making Norris-LaGuardia inapplicable to §301 actions. Each year that passes since *Sinclair* was decided in 1962 increasingly confirms the validity of the judgment. Congress has not been persuaded to change the *Sinclair* rule. It has not acted on the bills designed to modify it. The United States Supreme Court in *Sinclair* expressly referred the issue to Congress. This Court should now respect the will of Congress to leave well enough alone. *Sinclair* should not be subject to judicial reconsideration, let alone reversal.

4. The argument that because the Railway Labor Act was considered with the Norris-LaGuardia Act in *Brotherhood of Railway Trainmen v. Chicago River & Indiana Railway Co.*, 353 U.S. 30, (and other cases) then Section 301 of the Labor-Management Relations Act should also be considered with the Norris-LaGuardia Act is not supported by case law. The Supreme Court clearly held in *Brotherhood Railway Trainmen v. Chicago River & Indiana Railway Co.* (*supra*) that:

> "The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act, 49 Stat. 449, as amended, 29 U.S.C. 151 *et seq.* It is one of those differences which underlies the controversy in this case." (353 U.S. 30, 31 N.2).

The Brotherhood contended that the Norris-LaGuardia ban should apply in railroad labor cases in the same manner as it applies to other cases. In distinguishing the accommodation made between the Railroad Labor Act and Norris-LaGuardia, the Court held:

> "The Brotherhood has cited several cases in which it has been held that the Norris-LaGuardia Act's ban on Federal injunctions is not lifted because the conduct of the Union is unlawful under some other statute. We believe that these are inapposite to this case. None involved the need to accommodate the statutes, when both were adopted as a part of a pattern of labor legislation." (353 U.S. 30, 42).

IV.

Conclusion.

There really can be no question of interpretation of Section 4 of the Norris-LaGuardia Act. A strike injunction is squarely within its statutory proscription. While there may be reason for legislative action, there is no justification for judicial reconsideration of *Sinclair*. Judicial legislation is an evil that should be avoided by all Courts. For the foregoing reasons, the respondent submits that the petition for a writ of certiorari should be denied.

Dated: November 20, 1969.

Respectfully submitted,

ARNOLD, SMITH & SCHWARTZ,
KENNETH M. SCHWARTZ, ESQ.,
ROBERT M. DOHRMANN, ESQ.,
Attorneys for Respondent.

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IN THE

Supreme Court of the United States

October Term, 1969
No. 768

THE BOYS MARKETS, INC.,
Petitioner,

vs.

RETAIL CLERK'S UNION, LOCAL 770,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE PETITIONER.

Opinion Below.

The opinion of the Court of Appeals for the Ninth Circuit (App. 96) is reported at 416 F. 2d 368.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on September 26, 1969 (App. 95). Petition for Writ of Certiorari was filed October 24, 1969, and was granted January 12, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Question Presented.

Whether the United States District Courts have jurisdiction under Section 301 of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C., Section 185, to enjoin strikes and work stoppages by labor organizations in violation of the promises contained in their labor agreements with employers not to engage in strikes or work stoppages during the term of the agreement and to submit all disputes and grievances to arbitration.

Whether Section 4 of the Norris-LaGuardia Act, 29 U.S.C., Section 104, should be held not to bar the issuance of such injunctions but should be accommodated with Section 301.

Whether the United States District Courts are compelled, after removal of an action from a State Court in which an injunction was granted against a labor organization, to dissolve such injunction because of the command of Section 4 of the Norris-LaGuardia Act.

Whether the decision of this Court in *Sinclair Refining Co. v. Samuel M. Atkinson*, 370 U.S. 195 (1962), should be overturned.

Statutes Involved.

The statutory provisions involved are Section 1 and Section 301 of the Labor-Management Relations Act of 1947, as amended, 61 Stat. 136, 29 U.S.C. 151 and 185, and Sections 2, 4, 13(c) and 13(d) of the Norris-LaGuardia Act of 1932, 42 Stat. 70, 29 U.S.C. 102, 104, 113(c) and 113(d). The statutory provisions are printed in the Appendix to this brief.

Statement.

This case arises out of a strike by Respondent Union against one of Petitioner's retail supermarkets in breach of a "no-strike" contract. Petitioner obtained a temporary restraining order from the California State Court. The Union removed the action to the Federal District Court and moved to quash the restraining order. The District Court below denied the motion to quash and granted Petitioner's motion for an order compelling arbitration and for an injunction against the strike pending such arbitration. On appeal, the Court of Appeals reversed the District Court's order enjoining the strike and remanded the case for further proceedings.

The Employer, Petitioner herein, is a California corporation operating a chain of retail food supermarkets in and about the County of Los Angeles, California. The Union, Respondent herein, is a labor organization which represents the retail clerks employed by the Employer in its retail food supermarkets (App. 4-6). The events giving rise to this action took place at one of the Employer's supermarkets which is located in Cudahy, California.

The Employer and the Union at the time of the events in question were parties to a collective bargaining contract, in writing, known as the "Retail Food, Bakery, Candy and General Merchandise Agreement, April 1, 1964-March 31, 1969". This contract provided for the wages, hours, benefits and working conditions for the Employer's retail clerks and required arbitration of "any and all matters of controversy, dispute or disagreement of any kind or character existing between the

parties and arising out of or in any way involving the interpretation or application of the terms of this Agreement * * *" (App. 7).

In consideration of the agreement by the Employer to arbitrate disputes between the parties, the Union agreed that matters subject to the procedures set forth in the arbitration provisions "* * * shall be settled and resolved in the manner provided herein", and that "During the term of this Agreement, there shall be no cessation or stoppage of work, lock-out, picketing or boycotts, * * *" (App. 6).

On Tuesday, February 18, 1969, the Union objected to the use of non-bargaining unit employees by the Employer to relocate merchandise in frozen food cases of the Cudahy store and demanded that the Employer remove all of the merchandise from these frozen food cases, take it to the freezer in the back of the store and then have the cases restocked by retail clerks who were members of the Union. The Union representative told the Employer's frozen food supervisor that unless this action was taken as demanded by the Union, the Union "would pull the crew and commence picketing the store" (App. 33). The Employer refused to agree to these demands, and the Union's representative "* * * went through the store and told all the retail clerks to lock up and leave the store." (App. 34). All of the retail store employees left their employment. Agents of the Union stationed themselves on the sidewalk in front of the store and commenced telling customers that the store was "closed" and that there was "no service" in the store. Seven of the Union's agents began picketing the entrances to the store carrying signs which read, "LOCAL 770 — THIS STORE ON

STRIKE — PLEASE RESPECT OUR PICKET LINES" (App. 34).

The Employer's store suffered a substantial loss of business during the period of the picketing (App. 35), and the Employer estimated its damage at not less than $5,000.00 per day (App. 11).

The President of Food Employers Council, Inc., representing the Employer, immediately sent a telegram to the Union advising the Union of the existence of a dispute involving the interpretation and application of the labor agreement; demanding that the strike, work stoppage and picketing in violation of the contract be halted; and invoking the grievance and arbitration procedure required under the contract (App. 30). The Union continued the work stoppage and picketing.

On February 19, 1969, the Employer filed a Complaint for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction and for Specific Performance of Agreement to Arbitrate with the California Superior Court, County of Los Angeles, and made application for an Order to Show Cause and Temporary Restraining Order (App. 4). This application was granted by the State Court (App. 36). The Union was enjoined, pending a hearing on the Order to Show Cause, from picketing, engaging in a strike or concerted work stoppage and from inducing employees to engage in a strike or work stoppage or to refuse to perform their services for the employer.

The Union promptly removed the action to the United States District Court for the Central District of California and filed a Motion to Quash the State Court's Temporary Restraining Order (App. 42; 47). In op-

position, the Employer filed a Motion for Order Compelling Arbitration; For Order Requiring Specific Performance of Agreement to Arbitrate; and Application for Preliminary Injunction (App. 50).

On March 12, 1969, the District Court denied the Union's Motion to Quash the State Court injunction and granted the Employer an Order Compelling Arbitration and Order for Injunction (App. 74; 84). Finding that the dispute was required to be submitted to arbitration under the labor agreement between the Employer and the Union and that the strike and work stoppage was in violation of that contract, the Court ordered the parties to arbitrate the underlying dispute and enjoined the Union from picketing; carrying signs stating that employees were on strike; engaging in a strike or work stoppage; inducing employees to engage in a strike or work stoppage or inducing employees to refuse to perform their services.

Upon appeal filed by the Union, the Court of Appeals for the Ninth Circuit reversed the order of the District Court granting an injunction against the Union and remanded the case for further proceedings. In its decision, the Court of Appeals, with due regard for the factual similarity between this case and *Sinclair v. Atkinson*, held that it was "bound by the holding of *Sinclair*". (App. 96; 98).

Summary of Argument.

Sinclair v. Atkinson, 370 U.S. 195 (1962), which held that Section 4 of the Norris-LaGuardia Act prohibited the District Courts from enjoining strikes in breach of collective bargaining agreements, must be overruled in order to maintain equal enforceability of

labor agreements by employers and labor organizations and to preserve the harmony of the federal law of labor relations. The Supreme Court decisions which have followed *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957), have consistently emphasized that the national labor policy is best effectuated by contracts which substitute arbitration for the economic strike and which contain a covenant not to strike as a *quid pro quo* for the promise to resolve disputes by arbitration and for the wages and benefits agreed upon.

The federal labor policy which has been developed under the *Lincoln Mills* doctrine has placed heavy emphasis upon the substitution of arbitration of disputes for industrial warfare. The prohibition against granting equitable relief in strikes over disputes subject to arbitration is a serious flaw in present labor relations law. An injunction is the only effective means of enforcing no-strike pledges. Without injunctive relief, the promise not to strike becomes, as a practical matter, meaningless.

Since the decision in *Avco Corp. v. Aero Lodge 735, I.A.M.*, 390 U.S. 557 (1968) little is left of any significant remedy for employers confronted with strikes in breach of contract. State Court injunctions will very likely be effective only until the case is removed to the Federal Courts.

The *Sinclair* case is an anomalous decision, incorrectly interpreting the will of Congress as expressed in Section 301 of the Labor-Management Relations Act of 1947, and unnecessarily invoking the prohibitions of the Norris-LaGuardia Act, a 1932 enactment which has become an anachronism in the law. A review

of the legislative history makes clear the Congressional concern regarding the necessity for providing for enforceability of labor agreements. This history, however, is cloudy and imperfect upon the question of the intent of Congress regarding the equitable powers of Courts under Section 301. Upon re-examination, it cannot be said with assurance that Congress intended only to grant the Federal Courts the power to hear damage actions but to withhold by reason of the Norris-LaGuardia Act the power to enjoin strikes in breach of contract. This legislative history should not be considered as conclusive upon the issue.

The Norris-LaGuardia Act has been accommodated by the Courts with the anti-trust laws and with the Railway Labor Act. Section 4 of the Norris-LaGuardia Act should be interlaced with Section 301 of the Labor-Management Relations Act of 1947 so that injunctions, which are the only effective means of prevention of strikes and work stoppages in violation of labor agreements, may be granted by the Federal Courts just as agreements to arbitrate may be enforced by orders for specific performance, thus achieving equality and mutuality of remedy.

On balance, it is submitted that fundamental considerations of law and policy require that *Sinclair* be overturned. The result will provide the Federal Courts with the ability to fairly impose remedies necessary to insure the mutual enforceability of collective bargaining agreements and, thus, promote industrial peace.

ARGUMENT.

I.

Sinclair v. Atkinson Is a Judicial Barrier to the Effective Enforcement of No-Strike Provisions of Labor Agreements and, Being Out of Harmony With the Federal Law of Labor Relations, Should Be Overruled.

Once again this Honorable Court has before it the question of the scope and reach of Section 301 of the Taft-Hartley Act and the applicability of Section 4 of the Norris-LaGuardia Act to injunction proceedings arising out of suits for violation of collective bargaining agreements between employers and labor organizations. Squarely at issue is the power of the Federal Courts to enjoin breaches by labor organizations of the "no-strike" provisions of their agreements with employers and, correlatively, the question whether the Federal Courts must, by reason of the prohibitions of the Norris-LaGuardia Act, dissolve any State Court injunction in an action which has been removed to the Federal Courts under the provisions of the Removal Act.

There is little difference of significance between the facts of this case and those before the Court in *Sinclair Refining Company v. Samuel M. Atkinson*, 370 U.S. 195. Perhaps the only difference worthy of passing note is the fact that when confronted with a strike and work stoppage in breach of the contract by the Union, the Employer first obtained injunctive relief from the State Court; whereas, in *Sinclair*, the plaintiff-employer first sought relief in the Federal Court. This State Court action was promptly removed to the Federal District Court which, in turn, denied the Union's motion

to quash the State Court injunction and issued its own injunction, coupled with an order compelling the parties to arbitrate.

The Norris-LaGuardia Act was adopted by Congress in 1932 in response to the use of the injunctive powers of the Federal Courts to thwart organizing efforts of unions. The principal purposes sought to be accomplished by the Norris-LaGuardia Act were to outlaw "yellow dog" contracts and to prohibit the use of injunctions as a weapon against labor's efforts to organize employees. In 1935, Congress enacted the original Wagner Act[1] and, a little more than a decade later, adopted the Labor-Management Relations Act of 1947.[2]

The 1947 Act regulated the relationships between employer, employee and labor organizations. Section 301 of that Act granted jurisdiction to the Federal Courts of suits for violation of contract between an employer and a labor organization representing employees in industry affecting commerce.

The enactment of Section 301 inevitably posed the vexing problems of interpretation which have occupied the Courts for over two decades. In *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, 75 S. Ct. 489 (1955), this Court rejected the argument that Section 301 empowered the Federal Courts to fashion a federal law of labor relations and held that state law was the applicable substantive law to be applied to collective bargaining agreements.

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[1] 49 Stat. 449.

[2] 67 Stat. 136, 29 U.S.C. 151, *et seq.*

Westinghouse was but short-lived. Two years later, in 1957, *Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448, 77 S. Ct. 912, was decided. In this case, Section 301 was again examined, and the Court held that Congress had empowered the Federal Courts to compel specific performance of an arbitration agreement and that the Courts were empowered to fashion a body of federal law for the enforcement of labor agreements between employers and unions. Predictably, *Lincoln Mills* gave rise to extensive litigation upon critical legal issues inevitably generated by that decision. The crucial questions of the enforceability of arbitration provisions contained in labor agreements and of the awards of arbitrators were before the Court in the series of cases now popularly known as the "trilogy".[3]

It is fair to say that in these decisions the Court placed heavy emphasis upon the substitution of arbitration for industrial warfare as the "kingpin" of federal labor policy. Doubts were to be resolved in favor of arbitration, and the Courts were not to substitute their judgment for that of the arbitrator.

Extending the philosophy underlying *Lincoln Mills*, the Court later held that Section 301 did not divest the State Courts of jurisdiction over suits for violation of labor agreements and thus established the principle of concurrent jurisdiction.[4] In the same term, the Court

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[3] *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574; 80 S. Ct. 1347 (1960); *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564; 80 S. Ct. 1343; *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593; 80 S. Ct. 1358.

[4] *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 82 S. Ct. 519 (1962).

held that in a State Court action by an employer against a union for damages resulting from a strike, federal law was applicable and controlling over any incompatible principles of local law.[5] In this same case, the Court also held that the policy favoring the promotion of the arbitral process as a substitute for economic warfare was so important that an agreement not to strike would be implied to the extent that the parties had agreed to arbitrate disputes, even though no express no-strike clause existed.

The dominant theme of the decisions of this Court since *Lincoln Mills* has been the promotion of industrial stability through the collective bargaining agreement. The Court has sought to substitute arbitration fore industrial strife and has acknowledged that:

> "Complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement being the 'quid pro quo' for the agreement not to strike."[6]

The development of a complete federal law of labor relations, with mutuality and equality of enforceability of the provisions of labor agreements, was seriously hampered by this Court's decision in *Sinclair Refining Company v. Samuel M. Atkinson,* 370 U.S. 195, 82 S. Ct. 1328 (1962). The results reached in *Sinclair* could not have been forecast from the majority opinion

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[5]*Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co.,* 369 U.S. 95, 82 S. Ct. 571 (1962).

[6]*United Steelworkers of America v. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 578, Fn. 4; 80 S. Ct. 1347 (1960).

in *Lincoln Mills* which, although not addressing itself to the question, seemed to infer that labor agreements should be enforceable, both in law and in equity. Despite clear indications in the *Lincoln Mills* decision that the Court there had in mind the necessity of an effective method of assuring freedom from economic warfare during the term of the contract; despite a clear statement that Section 301 expressed a federal policy that Federal Courts should enforce labor agreements so as to obtain industrial peace; and, finally, despite the holding in *Lincoln Mills* that jurisdiction to compel arbitration of disputes was not restricted or impeded by Section 7 of Norris-LaGuardia, the Court in *Sinclair* held that the action involved a "labor dispute" within the meaning of the Norris-LaGuardia Act, and that inasmuch as Congress, in enacting Section 301, had not repealed Norris-LaGuardia, the Federal Courts were prohibited from enjoining strikes in breach of contract.

The courts of the several states have been the traditional forum for the litigation of disputes between employers and unions over the interpretation or application of their contracts. *Sinclair* insured that all applications for injunctive relief were made to State Courts. The impact of Norris-LaGuardia upon the powers of Federal Courts under Section 301 after removal of State Court actions was to linger unresolved.

This Court's decision in *Avco*[7] resolved the basic issue concerning federal jurisdiction after removal of a State Court action. Specifically left unresolved, however, were two related questions: Whether *Sinclair*

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[7] *Avco Corp. v. Aero Lodge 735, I.A.M.*, 390 U.S. 557, 88 S. Ct. 1235 (1968).

required dissolution of a removed State Court injunction, and whether remedies available in State Courts are limited to the remedies available under federal law.[8] Quite obviously, should *Sinclair* now be held to have been wrongly decided, not only will the fundamental question of the equitable powers of a Federal Court under Section 301 be redetermined but also settled will be the issue of the powers of such Courts in removed State Court actions, as well as the effect of Section 301 upon the powers of State Courts.

In the present case, the District Court not only denied a motion to quash the State Court injunction, but it also took the ultimate step of issuing its own injunctive order against the Union. The result is that the present case must be considered as though the action had been initially filed in the District Court and, therefore, directly raises the root question of the continuing validity of *Sinclair*. A removed State Court injunction action will often raise the same question. The reason is that many such actions are removed during the pendency of a temporary restraining order which ordinarily will have a very limited life. Under California law, for example, after a temporary restraining order issues, a hearing must be held within not less than fifteen days to determine whether or not a preliminary injunction should issue.[9]

Consequently, very shortly after removal, even in the absence of a motion to quash, the employer will necessarily be required to apply for further injunctive relief from the Federal Court in order to prevent resumption of a strike.

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[8]390 U.S. 557, 561, Fn. 4.

[9]California Code of Civil Procedure, Section 527.

An injunction is the only effective means of enforcement of a no-strike clause in a collective bargaining agreement.

> "* * * About all an employer can get in exchange for his commitments in a collective agreement is continued production—no work stoppages for the life of the agreement."[10]
>
> "A strike in breach of contract irreparably harms the employer. Orders are lost. Customers transfer their favor to employers who meet deadlines. The discharge of strike leaders does not end the strike; at best, it stops further efforts. A damage action tried years later to the vagaries of a jury is small recompense to the employer denied business because he cannot deliver. Equitable relief is not only the most appropriate remedy but also the most effective one. The order of the court compelling the union to refrain from engaging in a work stoppage in breach of contract has, as a practical matter, the effect of immediately ending the strike."[11]

The arbitration process is itself of little comfort to an employer who is confronted with a strike over a grievance that is subject to the arbitration procedure. Even though arbitration is perhaps a more expeditious reme-

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[10]Gregory, *The Collective Bargaining Agreement: Its Nature And Scope*, 1949, Wash. U.L.Q. 3, 12.

[11]Stewart, *No-Strike Clauses In The Federal Courts*, 59 Mich. L. Rev. 673, 674-675; See also, Comment, *Injunctive Relief Against A Union's Violation of a No-Strike Clause*, 52 Cornell L.Q. 132, 134; Cox, *Current Problems In the Law of Grievance Arbitration*, 30 Rocky Mtn. L. Rev. 247, 255, wherein Cox states that an employer cannot afford to further "exacerbate labor-management relations by suing a union made up of his employees after the end of the strike."

dy than a court action, it is, nevertheless, time-consuming. The Federal Mediation and Conciliation Service, in its 1968 annual report, stated that the average time between the date of request for a panel of arbitrators and the rendition of an award is 157.46 days.[12]

An employer, having reached agreement with the union upon the wages, benefits and conditions that are to be paid to the employees for the term of the contract, is most surely entitled to the one essential part of his bargain, namely, uninterrupted production. Unions must be required to settle the grievances and disputes that are certain to arise through the private arbitration process provided for under the agreement, and in the event that the contract is breached by the union, logic and reason clearly dictate that the employer should be entitled to the only effective remedy, court-imposed restraint of the work stoppage, thus preventing irreparable damage to the employer.

It has been said that *Sinclair* is out of harmony with *Lincoln Mills* and the landmark cases following that decision. Without doubt, it is out of harmony with the Congressional purpose in the enactment of the Taft-Hartley Act, as reflected in Senate Report No. 105:

> "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation dur-

[12] 70 LRR 324.

ing the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract."[13]

The pointed reference to the need for "some effective method of assuring freedom from economic warfare" strongly impels the conclusion that Congress did not intend that employers be deprived of injunctive relief against strikes in breach of contract.

As we have said, the theme of the federal labor policy that has been fashioned since *Lincoln Mills* has forcefully emphasized over and again the importance of substituting the arbitral process for the strike and the necessity of mutual and equal enforceability of contract provisions.[14]

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[13]353 U.S. at 454; 77 S. Ct. at 916; 80th Congress, Senate Report No. 105 on S. 1126.

[14]"The Labor Management Relations Act of 1947 represented a far-reaching and many-faceted legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process. It was recognized from the outset that such an effort would be purposeless unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored. Section 301(a) reflects Congressional recognition of the vital importance of assuring the enforceability of such agreements." *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 509, 82 S. Ct. 519, 523 (1962). "A major factor in achieving industrial peace is the inclusion of a provision for arbitration of grievances in the collective bargaining agreement." "The grievance procedure is, in other words, a part of the continuous collective bargaining process. It, rather than a strike, is the terminal point of a disagreement." *United Steelworkers of America v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578, 581, 80 S. Ct. 1347, 1350; 1352 (1960). Also, in deciding that a no-strike agreement should be implied in law even though not expressly stated where and to the extent an arbitration agreement exists, the Court said: "Even

(This footnote is continued on the next page)

The beacon that was lighted by *Lincoln Mills*—and extinguished by *Sinclair*—must be relit if federal labor policies are not to founder upon the reef of the Norris-LaGuardia Act. It is utterly incongruous that, under the federal law, employers and labor organizations are urged to enter into collective bargaining agreements under which industrial strife is to be replaced by a system of private, voluntary arbitration of contractual disputes; and that the law is best effected by enforcement of the spirit and intent underlying these contracts, if, nevertheless, the law denies employers their only meaningful remedy against strikes and work stoppages in violation of such agreements.

The compelling necessity for empowering Federal Courts to restrain breaches of the no-strike provisions of labor agreements is sharply underscored by the facts in this case. The Union and the Employer were parties to a comprehensive labor agreement which contained the promise of the Employer to arbitrate all disputes, and the covenant of the Union to refrain from strikes, work stoppages or picketing. Nevertheless, in clear violation of its contract, when the dispute arose over the stocking of the frozen food cases in the Cudahy store, the Union, dissatisfied with the Employer's refusal to accede to its demands, established a picket line and ordered the employees of the Employer to cease performing their duties. The store was emptied of customers and business virtually came to a halt for a day and a half. The Employer's loss of sales and its loss of

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more in point, a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." *Local 174, Teamsters, Etc. v. Lucas Flour Co.*, 369 U.S. 95, 105, 82 S. Ct. 571, 578 (1962).

customers can never be recovered nor can such loss even be determined. Who is to say how many angry or disappointed customers took their trade to the Employer's competitors, never to return?

The strike was halted only upon the issuance of a restraining order. There can be no doubt of the efficacy of this procedure nor of its equity.

Section 301, upon a literal reading, would appear to confer authority upon the Federal Courts to restrain strikes in breach of contract. Certainly, the unqualified use of the word "suits" strongly indicates that the full range of judicial remedies was intended to be made available for the adjudication of labor-management disputes. Since *Lincoln Mills,* there can be no doubt that Section 301 established substantive law which must be fashioned by the Federal Courts and which must be followed by State Courts. It is difficult to find reason or logic in the fact that the Courts are empowered under this Section to issue mandatory orders compelling parties to labor agreements to specifically perform their agreements to arbitrate; are to enforce the awards of arbitrators even though the Courts may disagree with the results; are to resolve all doubts in favor of arbitration; and, perhaps, may even enforce an arbitrator's award ordering a union to cease and desist from a strike;[15] but may not close the full circle of judicial remedies and restrain the most damaging act in breach of collective bargaining agreements.

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[15] *Philadelphia Marine Trade Assn. v. Int'l Longshoremen's Assn. Local 1291,* 365 F. 2d 295; 368 F. 2d 932, revs'd on other grds., 389 U.S. 64 (1967); *New Orleans S.S. Assn. v. General Longshore Workers, I.L.A.,* 389 F. 2d 369 (CA-5 1968), cert. den. 393 U.S. 828.

II.

The Legislative History of Section 301 Does Not Compel the Conclusion That Congress Intended Its Grant of Power to the Federal Courts to Be Restricted by the Earlier, Sweeping Prohibitions of the Norris-LaGuardia Act.

All of the arguments upon matters of policy and analogies drawn from lines of decisions which support Petitioner's position necessarily leave unanswered one single crucial question: Did the 80th Congress intend that the broad and sweeping prohibitions against injunctive relief contained in the Norris-LaGuardia Act should act as a limitation upon the exercise of equitable powers in suits for violation of collective bargaining agreements under Section 301? In short, was it the legislative purpose to deny the Federal judiciary power to enjoin strikes by unions in breach of their contracts with employers?

The question was quite forcefully answered in *Sinclair*. The majority agreed with lower court decisions which held that a strike in breach of a no-strike contract was a "labor dispute" within the meaning of the Norris-LaGuardia Act, and that the legislative history of Section 301 impelled the conclusion that Congress "deliberately chose" not to repeal the Norris-LaGuardia Act insofar as suits based upon breach of contract were concerned.[16] The argument that Congress intended to confer the power upon the courts to accommodate Nor-

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[16] 370 U.S. at 205.

ris-LaGuardia was rejected as "startling".[17] The Court's decision in *Chicago River* was distinguished, and the Court concluded that it was "its duty to give effect to the plainly expressed Congressional purpose with regard to the continued application of the anti-injunction provisions of the Norris-LaGuardia Act."[18]

Many legal scholars have disagreed. Professor Benjamin Aaron, for example, has said:

> "* * * Congress did not foresee the possibility of such a sharp conflict between the anti-injunction policy of Norris-LaGuardia and the policy in favor of specific enforcement of agreements to arbitrate which the Supreme Court subsequently read into Section 301. Consequently, one cannot see how Congress could have intended to preclude the possibility of injunctive relief against strikes for violation of such agreements. It would seem more reasonable to construe the ambiguous legislative history of section 301 as the dissenters did in the *Sinclair* case. The resulting accommodation of section 301 with section 4 of the Norris-LaGuardia Act seems no more tortuous and no less reasonable than the accommodation of Norris-LaGuardia which the Supreme Court effected in the *Chicago River* case."[19]

The opinion in *Sinclair* places considerable emphasis upon the fact that the original version of Section 301

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[17] 370 U.S. at 209.

[18] 370 U.S. at 213.

[19] Aaron, *The Labor Injunction Reappraised*, 10 U.C.L.A. L. Rev. 292, 342.

in the House bill declared Norris-LaGuardia to be inapplicable and to the fact that this provision was delected from the final measure. In this connection, another writer has observed that:

> "The legislative history of section 301, which shows that Congress refused to repeal the Norris-LaGuardia Act in contract litigation generally, is a history written without benefit of a full understanding of the ramifications of section 301. One should not draw as a negative inference from congressional failure to act the conclusion that Congress did not want the Court to deal rationally with section 301 and the Norris-LaGuardia Act where the two statutes intersect. Such a conclusion attributes more to Congress than its inaction properly can bear."[20]

The Norris-LaGuardia Act, adopted by Congress in 1932, was indeed a political response to the considerable use, and doubtless abuse, of the injunctive powers of the Federal Courts in the context of that turbulent period in the history of labor relations. These injunctions, often ill-advised, frequently issued *ex parte* upon the barest of evidence, and oft times reflecting the social philosophy of the judges, evoked massive criticism of the judiciary. At issue in this period was the basic question of the ability of labor organizations to organize employees and the right of employees to join unions.

It had become apparent that these restraining orders were a decisive element in the defeat of the organizational campaigns of the labor movement. Public opinion turned

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[20]Wellington and Albert, *Statutory Interpretation And The Political Process: A Comment On Sinclair v. Atkinson*, 72 Yale L. J. 1548, 1558.

against the courts, and the 1932 Anti-Injunction Act was the legislative response.[21]

The terms of the Act were broad and sweeping. Its object was to free labor of governmental intervention and to insulate the union efforts, from control by federal injunctions. The Act was intended to "protect, first, the right of free association, and, second, the right to advance the lawful object of the association."[22] The two principal purposes which it sought to accomplish were "to outlaw 'yellow dog' contracts and to prevent injunctions from being used as a method to discredit and handicap labor in contests with employers."[23]

The entire thrust of this legislation was to enable the labor movement to organize employees and to bargain with employers. It is entirely fair to say that Congress in the enactment of this legislation was not at all occupied with the problem of the regulation of the rights and relationships between employers and unions under a collective bargaining agreement—much less the legal interplay between agreements to arbitrate disputes and promises not to strike.[24] These questions were re-

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[21]See: Frankfurter and Greene, *The Labor Injunction;* Witte, *The Federal Anti-Injunction Act,* 16 Minn. L. R. 638; Gregory, *Labor And The Law.*

[22]H. Rep. No. 669, 72d Cong., 1st Sess. 10 (1932).

[23]Witte: *The Federal Anti-Injunction Act,* 16 Minn. L. Rev. 638, 654-655 (1932).

[24]"(Congress) did not intend to free unions from the one effective remedy after agreement was reached." Stuart, *No-Strike Clauses In the Federal Courts,* 59 Mich. L. R. 673, 677-678. "Thus the federal labor policy in 1932 with respect to injunctions clearly evidenced an intent by Congress to encourage and permit complete freedom of union organization without federal intervention, a new concept in the history of labor relations. This policy prohibited the issuance of injunctions based upon spurious alleged tortious conduct but it did not contemplate, reach or embrace activities or relations between a union and management

served for our era. The Norris-LaGuardia Act is of historical importance, but the majority of its provisions are today of little practical effect. The freedom to form and join unions and the right to bargain upon terms of employment have long since been brought within the protective provisions of the National Labor Relations Act. The yellow dog contract, were one ever to be found again, would have but a short life before the National Labor Relations Board.

Although the debates upon the Labor Relations Act in both the 79th and 80th Congress were by no means illuminating upon the issue before the Court, two conclusions may be drawn. Throughout these debates, the necessity for making collective bargaining agreements binding and enforceable against union and employer alike and the advisability of making unions suable in the Federal Courts were prime factors under consideration. Secondly, scant attention was devoted by Congress to consideration of the necessity for injunctive relief to enforce no-strike agreements and the potential conflict in this regard with Norris-LaGuardia.

It is true that Section 10 of the Case bill in the House[25] contained a provision that in the event of breach, "* * * in addition to any other remedy or remedies existing either in law or in equity, a suit for damages for such breach or for injunctive relief in equity * * *" may be brought in the Federal Courts.[26] This Section was modified by the elimination of the provision

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which followed the execution of a collective bargaining agreement." Marshall, *Federal Enforcement Of A No-Strike Clause By Injunctive Relief, Symposium* on Labor Relations Law (1961), Tulane Univ. Sch. of Law, Ralph Slovenko, Ed., Pg. 570.

[25]H. R. 4908, 79th Cong., 2d Sess.

[26]92 Cong. Rec. 765.

authorizing restraining orders with a comment by Mr. Case that it was thought that the bill met the situation by authorizing a suit for damages. The Senate amendment to the House bill was similar to Section 301, as eventually enacted, making no reference to injunctive relief. The minority report, however, makes it plain that the purpose of the amendment was to make contracts equally binding and enforceable; that the bill was intended to remedy the obstacle created by the difficulty of subjecting unions to legal process in the State Courts; and that the Norris-LaGuardia Act had insulated unions against liability for breach of contract.

In the 80th Congress, House bill, H. R. 3020, as reported, contained in Section 302 a provision that "any action for or proceeding involving a violation of an agreement between an employer and a labor organization or other representative of employees may be brought by either party in any district court of the United States * * *" and in Section (e) thereof, specifically provided that the Norris-LaGuardia Act "shall not have any application in respect of either party". Senate Bill S. 1126 contained a Section 301 which provided that:

> "Suits for violation of contracts concluded as the result of collective bargaining between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

There was no clause providing for non-applicability of the Norris-LaGuardia Act.

Considerable enlightenment upon the intent of Congress may be found in Senate Report No. 105 on S. 1126. (1 Leg. Hist. 407) The Committee on Labor and Public Welfare determined that "The problem of the inadequacies of existing laws on industrial relations is one of grave concern". Reflecting upon experiences under the Norris-LaGuardia Act and the 1935 Wagner Act, the Committee concluded that to the extent that these statutes, the regulations issued thereunder and the decisions regarding them "* * * have produced specific types of injustices or clear inequities between employers and employees, Congress should remedy the situation by precise and carefully drawn legislation." Again, the Committee commented that:

> "The need for such legislation is urgent. Supreme Court interpretations of the Norris-LaGuardia Anti-injunction Act and the Clayton Act seemed to have placed union activities, no matter how destructive to the rights of the individual workers and employers who are conforming to the national labor relations act, beyond the pale of federal law."

Within the discussion contained in this report upon the enforcement of contract responsibilities, the Committee commented that:

> "The committee bill makes collective bargaining contracts equally binding and enforceable on both parties. In the judgment of the committee, breaches of collective agreement have become so numerous that it is not sufficient to allow the parties to invoke the process of the National Labor Relations

> Board when such breaches occur (as the bill proposed to do in Title I). We feel that the aggrieved party should also have a right of action in the Federal courts. Such a policy is completely in accordance with the purpose of the Wagner act which the Supreme Court declared was 'to compel employers to bargain collectively with their employees to the end that an employement contract binding on both parties should be made.' (*H. J. Heinz & Co.*, 311 U.S. 514)."

The Committee was troubled, as we have noted before, by the fact that:

> "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations."

After discussing the difficulty in State Courts of bringing actions against unions as unincorporated associations and the divergency of laws among the States, the Committee took significant note of the fact that:

> "The Norris-LaGuardia Act has insulated labor unions, in the field of injunctions, against liability for breach of contract. It has been held by a Federal court that strikes, picketing or boycotting, when carried on in breach of a collective agreement, involve a 'labor dispute' under the act so as to make the activity not enjoyable (sic) without a showing of the requirements which condition the issuance of an injunction under the act. (*Wilson & Co. v. Birlin*, 105 F. 2d 948, C.C.A. 3)."

Section 301, as adopted, was contained in the conference report of the Senate and the House.[27] There

[27] H. Rep. No. 510, 80th Cong., 1st Sess.

was no discussion in the report or the debates upon the final draft that would in any way clearly indicate the final intention of the framers of this legislation. It is true that references may be found in earlier debates to the fact that Congress was authorizing Federal Courts to hear "damage" suits. These references are inconclusive and reflect little more than language used in the course of debate.

It is submitted that the legislative history cannot be said to force the conclusion that Congress really meant to continue the prohibitions of the Norris-LaGuardia Act in regard to actions brought under Section 301. On this precise point, the legislative history must be held to be cloudy and imperfect. It would seem that if such were the Congressional intent, the issue would such been reflected to a far greater extent in the congressional debates. The record is replete with discussions concerning the advisability of granting general jurisdiction to the Federal Courts. It is silent on the question of limitations upon the jurisdiction so granted.

On balance, however, four conclusions should be drawn: First, that Section 301, as well as other amendments, was an outgrowth of Congressional desire to provide effective remedies that would prevent strikes in breach of contract. Second, that Congress felt strongly that the Federal Courts must be made available as a forum in which unions could be sued for their transgressions without the common law problems of process that had insulated them from suits in so many States. Third, that Congress fully recognized that the Norris-LaGuardia Act, and court decisions thereunder, had completely insulated unions from effective remedies against strikes in breach of contracts. Fourth, that the primary

purpose, underlying all of the legislation, was to insure that collective bargaining agreements would be fully binding and equally enforceable.

Under *Sinclair*, coupled with *Avco*, no-strike clauses are virtually unenforceable and to a very real extent will become meaningless. The legislative history of Section 301 does not command this Court to apply the prohibitions of Norris-LaGuardia to suits brought in the Federal Courts for violation of contracts between employers and unions. The federal policy of labor relations cannot be effectuated unless *Sinclair* is overruled.

III.

Judicial Precedent Under the Anti-Trust Laws and the Railway Labor Act Support the Accommodation of Section 4 of the Norris-LaGuardia Act With Section 301 of the Labor Management Relations Act.

Precedents may be found in decisions under the anti-trust laws and under the Railway Labor Act, which strongly support the interlacing of the Norris-LaGuardia Act with Section 301. In 1941, the Court considered the impact of the Norris-LaGuardia Act upon the anti-trust laws of the United States. The question presented was whether the use of conventional, peaceful activities by a union in the course of a controversy with another labor organization, over certain jobs, constituted a violation of the Sherman Act. The government had indicted four officers of a carpenter's union alleging a criminal combination and conspiracy in violation of the anti-trust laws. In determining this issue, Mr. Justice Frankfurter, writing for the Court, *United States v. Hutcheson*, 312 U.S. 219; 61 S. Ct. 463

(1941), stated "* * * whether trade union conduct constitutes a violation of the Sherman law is to be determined only by reading of the Sherman law and Section 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct", and posed the question as follows: "Were then the acts charged against defendants prohibited or permited by these three interlacing statutes?" (312 U.S. at 231)

The Court characterized the statutes as practically and historically a series of enactments touching "* * * one of the most sensitive national problems," and then declared:

> "Such legislation must not be read in a spirit of multilating narrowness. On matters far less vital and far less interrelated we have had occasion to point out the importance of giving 'hospitable scope' to Congressional purpose even when meticulous words are lacking. Keifer & Keifer v. Reconstruction Finance Corporation, 306 U.S. 381, 391, 59 S.Ct. 516, 519, 83 L.Ed. 784, and authorities there cited. The appropriate way to read legislation in a situation like the one before us, was indicated by Mr. Justice Holmes on circuit: 'A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it,

and therefore we shall go on as before. Johnson v. United States, 1 Cir., 163 F. 30, 32, 18 L.R.A., N.S., 1194."[28]

Just as the Norris-LaGuardia Act impacts upon Section 301 of the National Labor Relations Act, so too it was inevitable that there would be a collision between Norris-LaGuardia and the Railway Labor Act. Under the Railway Labor Act, "minor" disputes between carriers and unions which involve the interpretation or application on their agreements are required to be adjudicated either by the National Railroad Adjustment Board or by other boards of adjustment established between the unions and the carriers.

The question of the power of the Federal Courts to grant injunctions enforcing compliance with the provisions of the Railway Labor Act arose in *Virginia Railway Company v. System Federation No. 40*, 300 U.S. 515, 57 S. Ct. 592 (1937). In this case the Court affirmed the issuance of a mandatory injunction by a District Court, requiring the carrier to bargain with the union. The Court held:

"It suffices to say that the Norris-LaGuardia Act can affect the present decree only so far as its provisions are found not to conflict with those of §2, Ninth, of the Railway Labor Act (45 U.S.C.A. §152, subd. 9), authorizing the relief which has been granted. Such provisions cannot be rendered nugatory by the earlier and more general provisions of the Norris-LaGuardia Act."[29]

In *Steele v. Louisville & N.R. Co.*, 323 U.S. 192; 65 S. Ct. 226 (1944), the Court affirmed the propriety

[28]312 U.S. at 235, 61 S. Ct. at 468.
[29]300 U.S. at 563, 57 S. Ct. at 607.

of injunctive relief to protect individual employees from discrimination by their recognized and certified collective bargaining representative, and in *Graham v. Brotherhood of Locomotive Fireman*, 338 U.S. 232; 70 S. Ct. 14 (1949), a case similar to the *Steele* case, the Court unanimously held that Norris-LaGuardia did not prohibit the federal courts from acting to compel compliance with the positive mandate of the Railway Labor Act.[30]

A striking parallel between the line of decisions accommodating the Norris-LaGuardia Act with the Railway Labor Act and the accommodation with Section 301 which is being urged upon the Court in this cause, may be found in *Brotherhood of Railway Trainmen v. Chicago River and Indiana Railway Company*, 353 U.S. 30; 77 S. Ct. 635 (1957). The reason for this parallel is the fact that, under the Railway Labor Act, "minor" disputes are first referred for settlement by negotiation or conference between the parties, but if they are unable to reach agreement the statute requires that the dispute be submitted to the National Railroad Adjustment Board. The Adjustment Board is a tribunal established by Congress to determine minor disputes and is a form of compulsory arbitration, similar in substantial respects to the system of arbitration established under labor agreements such as the one before the Court in this cause. In the *Chicago River* case, the carrier and the Brotherhood of Railroad Trainmen were involved in some 21 grievances, including claims for compensation and for reinstatement to employment in higher positions. The parties were unable to reach agreement and the carrier

[30] 338 U.S. at 237.

submitted the controversy to the Adjustment Board. The Brotherhood of Railroad Trainmen issued a strike call and upon application of the carrier a temporary restraining order was issued by a District Court. Shortly thereafter, the temporary restraining order was vacated by the Court, but upon an application to the Court of Appeals for the Seventh Circuit the order was reversed. A permanent injunction was then entered by the District Court.[81]

The Court affirmed the judgment of the Court of Appeals. With regard to the question of the effect of the Norris-LaGuardia Act upon the power of the Federal Courts to issue injunctions in labor disputes, the Court in *Chicago River* said:

> "We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable."[82]

The anomalous position of *Sinclair v. Atkinson* is strongly emphasized by these decisions, accommodating and interlacing the Norris-LaGuardia Act with the anti-trust laws and Railway Labor Act. In this connec-

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[81]See: 229 F. 2d 926.

[82]353 U.S. 30, 40; 77 S. Ct. 635, 640. In support of its decision, the Supreme Court cited *Brotherhood of Railroad Trainmen v. Howard*, 343 U.S. 768, 72 S. Ct. 1022 (1952), wherein the Court held: "Our conclusion is that the district court has jurisdiction and power to issue necessary injunctive orders (to enforce compliance with the requirements to the Railway Labor Act) notwithstanding the provisions of the Norris-LaGuardia Act". See also: *Locomotive Engineers v. Missouri-Kansas-Topeka R.R. Co.*, (1960) 363 U.S. 528; *Locomotive Engineers v. Louisville & Nashville R.R. Co.*, (1963) 373 U.S. 33.

tion, it must be noted that the Court in *Lincoln Mills* specifically refused to apply the strict procedural requirements of Section 7 of the Norris-LaGuardia Act to its order compelling arbitration on the authority of the *Virginia Railroad Company* case and *Graham v. Brotherhood of Railroad Firemen.*

The issue before the Court upon this appeal was well-summarized by the then Professor Cox:

> "* * * There is much the same conflict between the Norris-LaGuardia Act's blanket restrictions and the policy of Section 301 as there was in the *Chicago River* case between the blanket restrictions of the Norris-LaGuardia Act and the obligation to submit grievances to the Adjustment Board. From the standpoint of practical labor relations the two situations are exact parallels. In the *Lincoln Mills* case, only Mr. Justice Frankfurter voiced the older view 'that judicial intervention is ill-suited to the special characteristics of the arbitration process in labor disputes'. The majority gave precedence to legal sanctions. While the inappositeness of Section 7 made that decision relatively easy, the case suggests that the Court may carry the accommodation a step farther and achieve the equality of remedy between employers and unions by enjoining strikes which violate an agreement to arbitrate. Such a ruling would require strong judicial creativity in the face of the plain meaning of Section 4; such a ruling is unlikely; but unless Congress acts it is the only way to eliminate an anachronistic incongruity between two statutes which ought to form a coherent whole.[33]

[33]Cox, *Current Problems In the Law Of Grievance Arbitration,* 30 Rocky Mtn. L. Rev. 247, 255-256.

It is submitted that *Sinclair* should no longer be followed, and that the rationale of the *Hutcheson* and *Chicago River* decisions should be adopted so that Section 4 of the Norris-LaGuardia Act is to be interlaced with Section 301, thus affirming the power of the Federal Courts to restrain violations of labor agreements.

IV.

The Norris-LaGuardia Act Should Not Be Held to Require Automatic Dissolution of Removed State Court Injunctions.

The question of the effect of the Norris-LaGuardia Act and the *Sinclair* decision upon the powers of the Federal District Courts in connection with injunctions issued by State Courts for breach of contract and thereafter removed to the Federal Courts was reserved by this Court in its decision in *Avco Corp. v. Aero Lodge 735, I.A.M.* In the present case the District Court below issued its own order granting injunctive relief against the union pending arbitration. Thus, this case does involve the central question of the fundamental power of the District Courts under Section 301, and only correlatively touches upon the effect of that Section on removed injunction actions. The matter has been briefed with this fact in mind.

Petitioner has granted consent to the filing of certain *amicus curiae* briefs. It is our understanding that some of the *amici* are involved in cases in which District Courts, under the authority of *Sinclair*, granted motions to dissolve State Court injunctions in actions which had been removed to the Federal Courts. It is Petitioner's understanding that the briefs of such *amici* will fully cover this point.

Conclusion.

For the reasons stated, it is respectfully submitted that the judgment of the Court below should be reversed with instructions to affirm the order of the District Court granting injunction pending arbitration.

February 17, 1970.

JOSEPH M. MCLAUGHLIN,
WILLIAM B. IRVIN,
Counsel for Petitioner.

APPENDIX.

1. The relevant provisions of the Labor-Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. 185, are as follows:

§ 151. *Findings and declaration of policy*

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their

employment or other mutual aid or protection. July 5, 1935, c. 372, § 1, 49 Stat. 449; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 136.

§ 185. *Suits by and against labor organizations—Venue, amount, and citizenship*

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organzation as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

Service of process

(d) The sevice of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purposes of this section in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling. June 23, 1947, c. 120, Title III, § 301, 61 Stat. 156.

2. The relevant provisions of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. 101, et seq., are as follows:

Sec. 102. Public policy in labor matters declared

In the interpretation of this Act and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority

are defined and limited in such sections, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

Sec. 104. Enumeration of specific acts not subject to restraining orders or injunctions

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dsipute (as these terms are herein defined)

from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organizations or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Sec. 113. Definitions of terms and words used in chapter

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 768

THE BOYS MARKETS, INC.,
Petitioner,

vs.

RETAIL CLERK'S UNION, LOCAL 770,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF GENERAL ELECTRIC COMPANY, AMICUS CURIAE

STATEMENT OF INTEREST

General Electric Company, one of the largest employers in the United States, has a total employment in excess of 310,000 persons. It is engaged in the manufacture of industrial electrical equipment, products for national defense, consumer electrical appliances, electronic equip-

ment, medical equipment, jet engines, and in addition, an almost endless array of electrical items and machinery.

General Electric has over 250 manufacturing plants located in some 33 states and territories of the United States. More than 100 unions are parties to collective bargaining agreements with the Company. Virtually all such agreements contain "no strike" provisions which in varying degrees restrict the strike activity of the members of the bargaining groups.

During the term of the various collective bargaining agreements to which it is a party, General Electric is confronted too frequently with work stoppages and strikes in violation of valid "no strike" contract provisions. The most effective means of stopping contract breaches of this nature and of preventing labor organizations from resorting to strike activity prohibited by the contract are restraining orders and injunctions sought in state courts due to the prohibition against federal courts granting injunctive relief pronounced by this court in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962). Typically, actions filed in state court for injunctive relief are removed to federal district court by the defendant union.

The holdings in *Sinclair* and *Avco Corp.* v. *Aero Lodge No. 135, International Assn. of Machinists and Aerospace Workers*, 390 U.S. 557 (1968), have resulted in confusion and uncertainty in two major respects in removed cases. First, is the *Sinclair* mandate so broad as to compel a federal district court to dissolve a state granted injunction upon removal of a suit under Section 301(a) of the Taft-Hartley Act to district court? Secondly, is the desire for uniformity in the application of our national labor policy paramount to allowing a state court to exercise its recognized concurrent jurisdiction in Section 301(a) suits by

granting injunctive relief which is unavailable in federal district court by reason of the *Sinclair* holding?

Lack of a definitive statement from this court regarding the scope of *Sinclair* has resulted in diverse rulings among state courts, as well as federal courts. The inconsistent court rulings in turn lead to instability in industrial relations both for General Electric and other employers whose business activities also affect commerce.

General Electric seeks a ruling from this Court that *Sinclair* no longer has efficacy, and therefore that federal courts are not proscribed from granting initially injunctive relief to prevent violations of "no strike" provisions in collective bargaining agreements. But at the very least the Court is urged to clearly delimit *Sinclair* so that federal district courts will not be led to conclude that they have no alternative but to dissolve injunctions granted by state courts upon removal of Section 301(a) suits to district court, and moreover so that state courts will know what power they have to grant injunctive relief in such suits.

ARGUMENT

The principal question presented for review is whether or not Section 4 of the Norris-LaGuardia Act prohibits a federal district court from granting injunctive relief in an action brought under Section 301 of the Taft-Hartley Act seeking to enjoin a non-violent strike being conducted by a certified union representative in violation of a "no strike" clause in a collective bargaining agreement. Resolution of this question necessarily involves a re-examination of this Court's decision in *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962), in light of the current national labor policy as reflected by existing statutory and case law.

This case presents another question of considerable import—namely, whether or not in a Section 301 action injunctive relief issued by a state court remains in full force and effect in federal court after removal in the absence of an exercise of discretion by the federal district court in modifying or dissolving such relief. This latter question concerns the scope, as well as the present validity, of the *Sinclair* holding.

The question of whether a federal district court has the power to issue a restraining order or injunction in an action under Section 301 of the Taft-Hartley Act arises in cases removed to district court under 28 U.S.C. Section 1441(a) and (b), as well as in cases instituted in district court. Prior to removal of a Section 301 suit to district court, a plaintiff employer may seek and obtain interlocutory injunctive relief—whether in the form of a temporary restraining order or a temporary injunction or both. Where the state court has granted injunctive relief to an employer, upon removal of the action, the district court is confronted not only with the question of whether to grant further injunctive relief but also with the question of whether the injunctive relief granted by the state court remains in force and effect.

The case at bar, being a removed case, involves a district court order[1] which did two things: (1) restrained and enjoined the union from striking in violation of the "no strike" provision in the collective bargaining agreement between the parties and (2) overruled the union's motion to quash the temporary restraining order issued by the state court before removal.[2]

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1. Appendix, pages 84-88.

2. The Court of Appeals apparently either overlooked or ignored or attached little, if any, significance to that portion of the district court's order overruling the union's motion to quash. No reference is made in the opinion of the Court of Appeals to the

In contrast, *Sinclair* was initiated in federal district court. Thus, in *Sinclair*, the district court was confronted only with the question of whether it had power to grant original injunctive relief.

Initially, the propriety of the district court's action in overruling the motion to quash will be discussed, and thereafter the district court's power to restrain and enjoin the union in the face of *Sinclair* will be covered.

I.

A. The Granting of Injunctive Relief by a State Court in a Section 301(a) Suit Against Strike Activity in Violation of a "No Strike" Clause in a Collective Bargaining Agreement Is Not Prohibited by Section 4 of the Norris-LaGuardia Act or by the Current National Labor Policy.

Prior to deciding whether injunctions issued by state courts remain in effect when a Section 301 suit is removed to district court, it is necessary to determine whether or not state courts are prohibited from granting injunctive relief in such suits to prevent violations of "no strike" clauses.[3] While we have a strong conviction to the contrary, it will be assumed for the moment that district courts are without power to grant injunctive relief in an action under Section 301 of Taft-Hartley because of the prohibition contained in Section 4 of Norris-LaGuardia.

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fact that the motion to quash was overruled. Further, the Court of Appeals stated,

> "The *sole* question on this appeal is whether the court below had justification to enjoin a strike where that strike is in violation of a no-strike clause." (Emphasis added.) 416 F.2d 368 at 369.

However, the effect of the overruling of the union's motion to quash was to continue the temporary restraining order in force.

3. This court has recognized that this question is an open one. *Avco Corp.* v. *Aero Lodge No. 135, International Assn. of Machinists and Aerospace Workers*, 390 U.S. 557 (1968); *N.L.R.B.* v. *C. & C. Plywood Corp.*, 385 U.S. 429, n. 15 (1967); *Charles Dowd Box Co., Inc.* v. *Courtney*, 368 U.S. 502 (1962).

Section 4 of the Norris-LaGuardia Act[4] provides as follows:

> "*No court of the United States* shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of [certain enumerated acts]." (Emphasis added.)

Section 13 of the same Act[5] defines the phrase "court of the United States" in the following manner:

> "When used in this chapter, and for the purposes of this chapter— . . .(d) The term 'court of the United States' means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia."

In view of the definition just quoted, it is clear that the provisions of the Norris-LaGuardia Act do not expressly prohibit state courts from issuing injunctions in actions proceeding under Section 301(a) of Taft-Hartley.

In 1962 the Supreme Court held in the case of *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, *supra*, that federal courts are precluded from issuing injunctions in Section 301 suits because of the provisions of Section 4 of the Norris-LaGuardia Act. The *Sinclair* holding, when considered in light of the Supreme Court's decision in *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flower* Co., 369 U.S. 95 (1962), stressing the need for uniformity in conjunction with our national labor policy, has caused some concern with regard

4. 29 U.S.C. Section 104.
5. 29 U.S.C. Section 113.

to the desirability of a state court enjoining a union from conducting a peaceful strike in violation of a "no strike" clause in a collective bargaining agreement. In short, does the need for uniformity in the application of our national labor policy dictate that the remedies available in state and federal courts in Section 301(a) suits be the same?[6]

The need for uniformity came into focus when this court concluded in *Textile Workers Union of America* v. *Lincoln Mills of Ala.*, 353 U.S. 448 (1957), that "the *substantive* law to apply in suits under Section 301(a) is federal law, which the courts must fashion from the policy of our national labor laws."[7] (Emphasis added.) Later decisions of this Court have emphasized that federal *substantive* law controls suits under Section 301(a) of Taft-Hartley.[8] The desire for uniformity has not been the decisive factor in every case, however, as is illustrated by *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO* v. *Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), which was essentially an action brought by a union for damages for breach of a collective bargaining agreement. The Court held in that case as follows:

". . . since no federal provision governs, we hold that the timeliness of a Section 301 suit, such as the pres-

6. The Supreme Court reserved decision on this question in *Avco Corp.* v. *Aero Lodge No. 135, International Assn. of Machinists and Aerospace Workers*, 390 U.S. 557, n. 4, *supra*. There is a divergence of opinion on this question between the Courts of Appeals for the third and sixth circuits. *Am. Dredging Co.* v. *Local 25*, 338 F.2d 839 (3 C. 1964); *Avco Corp.* v. *Aero Lodge No. 735, International Assn. of Machinists and Aerospace Workers*, 376 F.2d 342 (6 C. 1967).

7. 353 U.S. at 456.

8. *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flower Co.*, 369 U.S. 95, *supra*; *Avco Corp.* v. *Aero Lodge No. 135, International Assn. of Machinists and Aerospace Workers*, 390 U.S. 557, *supra*.

ent one, is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations."[9]

The court in *Hoosier Cardinal* concluded:

> "The need for uniformity, then, is greatest where its absence would threaten the smooth functioning of those consensual processes that federal labor law is chiefly designed to promote—the formation of the collective agreement and the private settlement of disputes under it."[10]

It is submitted that the need for uniformity in applying our national labor policy is not significantly hindered by allowing state courts to issue either temporary restraining orders or temporary or permanent injunctions in Section 301(a) suits unless such injunctive relief unduly prejudices or discriminates against the exercise of a substantive right conferred by Section 301(a).

Where a state issued injunction has the effect of encouraging or even compelling the party enjoined to resort to the procedures for the handling of grievances and arbitration set forth in a collective bargaining agreement, rather than methods of self-help, it is strongly urged that no substantial conflict occurs with the national labor policy which is "to promote industrial stabilization through the collective bargaining agreement."[11]

Due to the fact that it has been established that state and federal courts have concurrent jurisdiction over Section 301(a) suits,[12] some conflicts are destined to occur

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9. 383 U.S. at 704. The Court declined to characterize statutes of limitations as either substantive or procedural or as primary or remedial. *Id.* at 703, n. 4.

10. *Id.* at 703.

11. *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960), at 579.

12. *Charles Dowd Box Co., Inc.* v. *Courtney*, 368 U.S. 502, *supra*.

in the application of our national labor policy.[13] No doubt the number of such potential conflicts has been greatly minimized by the holding in *Avco Corp.* v. *Aero Lodge No. 135, International Assn. of Machinists and Aerospace Workers,* 390 U.S. 557, *supra,* that a Section 301 action may be removed to federal district court, it being within the "original jurisdiction" of district courts within the meaning of 28 U.S.C. Section 1441(a) and (b). However, in the present case, there is no legitimate question of conflict in the application of the federal labor policy by a dual court system; instead, the issue is whether state courts should be permitted to grant more complete relief by issuing restraining orders and injunctions in Section 301 suits against violations of "no strike" clauses.

The argument advanced here is buttressed by the majority opinion in *McCarroll* v. *Los Angeles County Dist. Council of Carpenters,* 49 Cal. 2d 45 (315 P.2d 322) (1957). There Justice (now Chief Justice) Traynor of the California Supreme Court dealt with the question under discussion in the following manner:

> "Section 301 of the Labor Management Relations Act does not embody any policy that requires a state court enforcing rights created by that section to withhold injunctive relief. The principal purpose of section 301 was to facilitate the enforcement of collective bargaining agreements by making unions suable as entities in the federal courts, and thereby to

13. "It is implicit in the choice [respecting the enforcement of collective bargaining agreements] Congress made that diversities and conflicts may occur, no less among the courts of the eleven federal circuits, than among the courts of the several states, as there evolves in this field of labor managament relations that body of federal common law of which Lincoln Mills spoke. But this not necessarily unhealthy prospect is no more than the usual consequence of the historic acceptance of concurrent state and federal jurisdiction over cases arising under federal law. To resolve and accommodate such diversities and conflicts is one of the traditional functions of this Court." *Id.* at 514.

remedy the one-sided character of existing labor legislation. See United Packinghouse Workers v. Wilson & Co., D.C.N.D. Ill., 80 F.Supp. 563, 568. We would give altogether too ironic a twist to this purpose if we held that the actual effect of the legislation was to abolish in state courts equitable remedies that had been available, and leave an employer in a worse position in respect to the effective enforcement of his contract than he was before the enactment of section 301.

"Nothing in the nature of the rights created by section 301 requires that injunctive relief be denied in their enforcement. Such relief would of course not impair any federal contract right, nor would it expand it in conflict with any policy that we have been able to discern in the statute. To the contrary, the principal purpose of the statute is to encourage the formation and effective enforcement of collective bargaining agreements. See Textile Workers v. Lincoln Mills of Alabama, 77 S.Ct. 912. The restriction on the remedies available in the federal courts arises not from any policy in the Labor Management Relations Act itself but from the Norris-LaGuardia Act, and the policy of that statute as we have seen is confined to the federal courts. See Associated Tel. Co. v. Communication Workers, D.C.S.D. Cal., 114 F.Supp. 334, 341; Philadelphia Marine Trade Assn. v. International Longshoremen's Assn., 382 Pa. 326, 115 A.2d 733, 736, certiorari denied, 350 U.S. 843, 76 S.Ct. 84, 100 L.Ed. 751; Wollett and Wellington, Federalism and Breach of the Labor Agreement, 7 Stan. L.Rev. 445, 456-460.

"Finally, there is no invariable requirement, implicit in the federal system, that a state court enforcing a federal right must not go beyond the remedies available in a federal court. Uniformity in the determination of the substantive federal right itself is no doubt a necessity, but such uniformity is not threat-

ened because a state court can give a more complete and effective remedy."[14]

The court should bear in mind that procedural safeguards exist against the unwarranted issuance of injunctive relief by a state court. Within the framework of many state procedural systems while a temporary restraining order may issue ex parte, a hearing upon notice on the application for an interlocutory injunction must be held promptly.[15] If the action is removed to district court pursuant to the provisions of 28 U.S.C. Section 1441 (a) and (b), the district court may modify or dissolve any restraining order or injunction issued by the state

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14. 315 P.2d at 332.

15. E.g., Section 65 of the Ga. Civil Practice Act, as amended (Ga. Code Ann. Section 81A-165), provides in relevant part as follows:

"Section 65. Injunctions.—

"(a) Preliminary; notice.—No interlocutory injunction shall be issued without notice to the adverse party.

"(b) Temporary restraining order; notice, hearing; duration.—No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; and shall expire by its terms within such time after entry, not to exceed 30 days, as the court fixes, unless the party against whom the order is directed consents that it may be extended for a longer period. In case a temporary restraining order is granted without notice, the motion for an interlocutory injunction shall be set down for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for an interlocutory injunction, and if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require. . . ."

court in the exercise of discretion conferred upon it by the provisions of 28 U.S.C. Section 1450, if the merits of the case warrant such action. In any event this Court can review the action of either state or federal courts in issuing injunctive relief in a Section 301 (a) suit.

Still assuming *arguendo* that federal courts have no power to issue injunctions in Section 301 actions by reason of the provisions of Section 4 of the Norris-LaGuardia Act, it follows nevertheless that state courts are not prohibited by either Section 4 of Norris-LaGuardia or our national labor policy from granting injunctive relief against a strike[16] in violation of a "no strike" provision in a collective bargaining agreement. A contrary conclusion would have the effect of denying to an employer a remedy available to him prior to the passage of the Taft-Hartley Act.

B. Upon Removal of a Section 301(a) Suit to Federal District Court, an Injunction Granted by a State Court in Such a Suit Continues in Force by Operation of Law until Modified or Dissolved by the District Court in a Proper Exercise of Discretion under 28 U.S.C. Section 1450, Notwithstanding Sinclair.

The Court's attention is directed now to the question of whether an injunction or restraining order issued by a state court remains in effect upon removal of a Section 301 suit to district court.[17] Whenever any action has been removed from state court to district court under 28

16. Excluded from consideration are strikes involving repeated acts of violence, destruction or damage to property, violation of local law which does not involve at the same time an unfair labor practice within the meaning of the National Labor Relations Act, as amended, or otherwise coming within the purview of a state's police power.

17. No decision was made on this question in *Avco Corp.* v. *Aero Lodge No. 135, International Assn. of Machinists and Aerospace Workers*, 390 U.S. 557, n. 4, *supra*.

U.S.C. Section 1441(a) and (b), it is provided in part in 28 U.S.C. Section 1450 as follows:

> "All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court."

Professor Moore in his treatise on federal practice states that the portion of 28 U.S.C. Section 1450 just quoted "provides that injunctions, orders and other proceedings, which include pending motions, had in the state court prior to removal are not affected by removal; in turn, the statute grants the federal court full power to dissolve, modify or vacate pre-removal orders of the state court that have not become conclusive upon the parties."[18]

In *Duncan* v. *Gegan*, 101 U.S. 810 (1879), this Court held the following:

> "The transfer of the suit from the State Court to the Circuit Court did not vacate what had been done in the State Court previous to the removal. The Circuit Court, when a transfer is effected, takes the case in the condition it was when the State Court was deprived of its jurisdiction. The Circuit Court has no more power over what was done before the removal than the State Court would have had if the suit had remained there. It takes the case up where the State Court left it off."

In several instances lower federal courts have held that upon removal of a case to district court an injunction issued by a state court which a federal court would have

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18. 1A Moore's Federal Practice, Par. 0.168 (4.-5) (2d ed. 1965).

been prohibited by federal statute[19] from granting remains in effect until modified or dissolved by the district court.[20]

Where a state court has granted an injunction or restraining order or both in a Section 301 suit, upon removal of the case to district court such injunctive relief continues in full force and effect by operation of the above-quoted provisions of 28 U.S.C. Section 1450 until such time as the district court in a proper exercise of discretion dissolves or modifies the state granted injunctive relief. Assuming once again for the purpose of argument that Section 4 of Norris-LaGuardia prohibits a federal court in a Section 301 suit from issuing an injunction against a strike in violation of a "no strike" provision in a collective bargaining agreement, Section 4 of Norris-LaGuardia has application only in those instances where the district court seeks to grant an injunction or restraining order in the first instance.[21]

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19. In each of these cases the federal statute prohibiting the district court from granting an injunction was Rev. St. Section 720 (a predecessor of 28 U.S.C. Section 2283) which read as follows:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

20. *Smith* v. *Schwed*, 6 Fed. 455 (C.C.W.D. Mo. 1881), *app. dismissed* 106 U.S. 188; *Perry* v. *Sharpe*, 8 Fed. 15 (C.C.S.D. Ohio 1881); *Eureka & K.R.R. Co.* v. *Cal. & N. Ry. Co.*, 103 Fed. 897 (C.C.N.D. Cal. 1900), *aff'd* 109 Fed. 509 (9 C. 1901).

21. The Court of Appeals for the Fifth Circuit reached a contrary conclusion in *General Electric Co.* v. *Local Union 191, Affiliated with International Union of Electrical, Radio, and Machine Workers (AFL-CIO)*, 413 F.2d 964 (5 C. 1969). There the Court of Appeals concluded:

> "We are of the view that the District Court did not err in dissolving the injunction, not because either *Sinclair*, supra, or *Avco*, supra, explicitly dictates that result, but because, in our view, once this case was removed, a failure to dissolve the state court injunction would have been tantamount to issuance of that same injunction by the federal district court, which, as we have just noted, would be proscribed by the Norris-LaGuardia Act under the *Sinclair* decision."

It is submitted that this result is erroneous because injunctions issued by state courts continue in force by operation of law upon removal to district court.

II.

Sinclair Is Not in Accord with Our Current National Labor Policy and Should Not Be Followed.

Since 1962, when *Sinclair* was decided, the undesirable effect of that decision upon the collective bargaining process has become manifest both at the bargaining stage and in the enforcement of the rights and obligations created by the collective bargaining agreement.

The effectiveness of the "no strike" clause was diluted considerably by *Sinclair* because it removed one of the primary means of enforcement of that clause. Consequently, the "no strike" clause presently does not constitute a major inducement to an employer to enter into a collective bargaining agreement. While a "no strike" clause still will support a claim by an employer for damages for breach thereof asserted either in an action at law[22] or through arbitration,[23] depending on the provisions of the collective bargaining agreement, neither means of seeking damages is an adequate substitute for an injunction against a strike which is causing irreparable disruption of an employer's business. As a practical matter, the delay necessarily attendant upon realizing a satisfaction of any judgment or arbitrator's award for damages against a union can have a crippling effect upon a company's financial status, especially where the union is unable to fully satisfy the judgment or award because of insufficient funds. Also, frequently an employer is compelled to forego his claim for damages in order to restore some semblance of industrial tranquility.

The Supreme Court has recognized the collective bargaining agreement as "an effort to erect a system of in-

22. *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238 (1962).

23. *Drake Bakeries, Inc.* v. *Local 50, Am. Baking & Confectionery Workers International, AFL-CIO*, 370 U.S. 254 (1962).

dustrial self-government."[24] But such efforts will not be fruitful and indeed will be frustrated unless appropriate means of enforcement are available to compel the parties to the agreement to adhere to the terms thereof rather than resorting to methods of self-help.

In *United Steelworkers of America* v. *Am. Mfg. Co.*, 363 U.S. 564 (1960), this Court stated at page 567:

> "In our role of developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements, we think special heed should be given to the context in which collective bargaining agreements are negotiated and the purpose which they are intended to serve. See Lewis v. Benedict Coal Corp., 361 U.S. 459, 468, 80 S.Ct. 489, 495, 4 L.Ed.2d 442."

In performing this role the Supreme Court must determine the present relative weight of Norris-LaGuardia in the statutory scheme upon which our national labor policy is based. The need for further development and refinement of the collective bargaining process necessitates that Norris-LaGuardia be given a lesser role than was assigned to it by the majority of the court in *Sinclair* in 1962.

It is strongly urged that the goal of achieving industrial stabilization through the collective bargaining agreement can best be achieved by harmonizing Norris-LaGuardia with Taft-Hartley so as to specifically authorize federal district courts, as well as state courts, to enjoin a strike in violation of a "no strike" clause in a collective bargaining agreement. The *Sinclair* holding does not comport with our present federal labor policy, and therefore it should not be permitted to stand as a precedent.

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24. *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 574, *supra*, at p. 580.

CONCLUSION

For the reasons stated hereinbefore, it is strongly urged that the Court of Appeals for the Ninth Circuit erred in reversing the judgment of the district court enjoining the union strike and remanding the case for further proceedings. Accordingly, this court should reverse the judgment of the Court of Appeals with direction to affirm the action of the district court both in restraining and enjoining the union and in overruling the union's motion to quash the state court's temporary restraining order.

Respectfully submitted,

BRANCH AND SWANN

JOHN E. BRANCH

JAMES PULM SWANN, JR.

JOHN K. DUNLAP

February 24, 1970

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 768

THE BOYS MARKETS, INC., *Petitioner,*

v.

RETAIL CLERKS UNION, LOCAL 770, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE *

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over 3,700 state and local chambers of commerce and

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* This brief is filed with the written consent of both parties pursuant to Supreme Court Rule 42 (2).

trade and professional associations, a direct business membership in excess of 38,000, and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

This brief *amicus curiae* supports the position of the petitioner urging reversal of the decision below. The interest of the *amicus* is predicated upon the far-reaching significance of this case which will profoundly affect the continuing validity of the premise that "the basic policy of national labor legislation [is] to promote the arbitral process as a substitute for economic warfare." *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U.S. 95, 105 (1962). For that precept will be dangerously eroded, if not destroyed, if this Court rules, as did the court below, that *Sinclair Refining Company* v. *Atkinson*, 370 U.S. 195 (1962), can stand in the face of this Court's recent decision in *Avco Corp.* v. *Aero Lodge 735, I.A.M.*, 390 U.S. 557 (1968).

The vast majority of unionized employers rely upon the arbitral process, and correlative contractual promises not to strike, to insure vital labor stability during the term of their collective bargaining agreements. A study by the Bureau of National Affairs disclosed that 94% of union contracts contain some form of no-strike clause. Bureau of National Affairs, *Basic Patterns in Union Contracts*, 1964, p. 77:1. Employer reliance upon peaceful determination of contract disputes, however, often proves to have been misplaced. Work stoppages during a contract term, whose purpose and effect is rejection of the arbitral process as the agreed method for resolving labor disputes, remain

a substantial source of industrial strife.[1] The present case will determine whether employers have an effective means to preclude such work stoppages by securing injunctive relief against them, and whether, as a result, Congress accomplished its objective of promoting industrial peace by placing "sanctions behind agreements to arbitrate" (*Textile Workers Union* v. *Lincoln Mills,* 353 U.S. 448, 456 (1957)) and expanding the "availability of forums for the enforcement of contracts made by labor organizations." (*Chas. Dowd Box Co.* v. *Courtney,* 368 U.S. 502, 508-9 (1962)). For these reasons the case is a critical one warranting a presentation of the Chamber's view.[2]

ARGUMENT

I

Sinclair Cannot Stand in the Face of Avco

This Court's 1968 decision in *Avco* casts the *Sinclair* issue and the *Sinclair* decision in a wholly new light. *Avco* makes of *Sinclair*, whose result was said to be dictated by the intent of Congress, an instrument for defeating the clear congressional purpose of § 301 of the Labor Management Relations Act of 1947. That purpose was not to detract from state jurisdiction to

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[1] The latest figures of the U.S. Department of Labor, Bureau of Labor Statistics, indicate that during 1968, 1,585 work stoppages, or 31.4% of the total number of stoppages, involving over 724,000 workers, were stoppages that occurred during the term of agreements but not in connection with negotiations of new contracts. The workdays lost by such stoppages were a lesser percentage (9.9%) of the workdays lost by all stoppages. U. S. Department of Labor, Bureau of Labor Statistics, *Work Stoppages in 1968 (Selected Final Tabulations)*, June 1969, p. 5.

[2] For similar reasons the Chamber also submitted a brief *amicus curiae* in *Avco.*

remedy contract breaches that existed prior to § 301, but rather to supplement such traditional state jurisdiction with federal jurisdiction. *Chas. Dowd Box Co.* v. *Courtney,* 368 U.S. 502 (1962). Yet today unions confronted by a state court suit to enjoin a strike in breach of contract need only remove the suit to a federal court where, under *Avco,* remand may not be had and where, under *Sinclair,* no injunction may issue. Thus *Sinclair,* with the advent of *Avco,* has effectively *eliminated* state court jurisdiction to enjoin strikes in breach of contract that not only existed prior to *Sinclair* but existed also after *Sinclair,* and until *Avco;* in federal jurisdictions that permitted remand after removal. *American Dredging Co.* v. *Local 25, Operating Engineers,* 338 F.2d 837 (3d. Cir. 1964), *cert. denied,* 380 U.S. 935 (1965). If any state court jurisdiction to enjoin strikes in breach of contract now remains it is theoretical only, and thus without utility and without substance.

The destruction of state court jurisdiction to enjoin strikes in breach of contract which resulted from *Sinclair* coupled with *Avco* is diametrically contrary to the "explicit evidence that [in enacting § 301] Congress expressly intended not to encroach upon the existing jurisdiction of the state courts." *Dowd Box,* 368 U.S. at 509. *Dowd Box,* which analyzes the legislative history of § 301 at great length, compels the conclusion that Congress, by giving the federal courts jurisdiction in collective bargaining contract cases and in the process imposing upon the state and federal courts the duty of fashioning federal law to promote the fair and peaceful administration of those contracts, had in mind not at all to take away from the state courts any of the jurisdiction they already possessed to carry out

that purpose, including the jurisdiction to enjoin strikes in breach of contract. Congress intended to *add* to the means of carrying out that purpose by giving jurisdiction to the federal courts in order to fill a jurisdictional gap which existed in some state courts, so that unions and employees would nowhere be immune from judicial review and enforcement of their obligations under collective bargaining contracts. "Section 301 . . . had as its *most articulate purpose* the *supplementing* of state remedies." Summers, *Labor Law Decisions of Supreme Court, 1961 Term,* ABA Section of Labor Relations Law Proceedings, 51, 63 (1962). (Emphasis added). See also the collation of the legislative history attached as an appendix to Justice Frankfurter's dissent in *Lincoln Mills,* 353 U.S. at 485-556, which similarly puts beyond the realm of doubt this reading of the congressional purpose.

In *McCarroll* v. *Los Angeles County District Council of Carpenters,* 49 Cal. 2d 45, 315 P. 2d. 322 (1958), *cert. denied,* 355 U.S. 932 (1958), Justice Traynor said:

> "We would give altogether too ironic a twist to this purpose if we held that the actual effect of the legislation was to abolish in state courts equitable remedies that had been available, and leave an employer in a worse position in respect to the effective enforcement of his contract than he was before the enactment of section 301."

Sinclair, however, now that *Avco* has ruled that § 301 suits removed from state courts cannot be remanded, has led to just that ironic result. Its effect has been to stand upon its head the clear congressional purpose to support not undercut arbitration, and to supplement not undercut state court jurisdiction. Arguments that this unlooked-for result must have been the true con-

gressional intent after all, or that the fact that the intent of Congress has been thus perverted is "irrelevant,"[3] are not persuasive, to say the least. The only way to correct the misapplication of congressional intent which is embodied in *Sinclair* and that has now been exposed by *Avco* is for *Sinclair* to be overruled.[4]

II

Section 301 Authorizes Injunctions Against Strikes in Breach of Contract

The *Avco* decision places the capstone of unanswerable persuasiveness on Justice Brennan's dissent in *Sinclair*. The dissent amply demonstrates why it is erroneous to read § 301 as drawing up short just before the point where it would effectively validate the union side of the agreement to arbitrate. The dissent ascribes to § 301 the full, substantive content of effectuation of

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[3] Dunau, *Three Problems in Labor Arbitration*, 55 Va. L. Rev. 427, 468-473 (1969).

[4] Note 4 of the *Avco* opinion raises the possibility that state court jurisdiction to enjoin strikes in breach of contract may retain content, despite *Avco* and even if *Sinclair* is reaffirmed, if federal district courts are not required to dissolve state court injunctions that had been issued prior to removal. The distinction between the absence of original jurisdiction to issue an injunction and the jurisdiction necessary to enforce another court's injunction presents serious theoretical problems. The distinction is called "fanciful" and a "juridical absurdity" in Dunau, *op. cit.*, 55 Va. L. Rev. at 472, n. 122. In addition such a distinction, if adopted, would tend to make the availability of injunctive relief depend on nothing more than the relative speed with which opposing lawyers and the state court act. Permission to federal courts not to dissolve state court injunctions would prove to have practical utility in only a few cases. Although this would at least be preferable to complete elimination of the state court jurisdiction to enjoin strikes in breach of contract that has so long existed, we reiterate that the proper solution to the dilemma caused by *Avco cum Sinclair* is the overruling of *Sinclair*.

the national labor policy favoring arbitration that *Lincoln Mills* and all the Supreme Court § 301 cases that came after *Lincoln Mills,* with the exception of *Sinclair,* have ascribed to it.

No semantic legerdemain can reconcile the congressional desire to achieve industrial peace through effective enforcement of collective bargaining agreements with restricting § 301 to a one-way street that fails to provide meaningful enforcement of union contractual obligations. Moreover, a reading of § 301 which fails to give credence to the union's commitment to arbitrate rather than strike does violence to its language. "There is nothing in the words of § 301 which so much as intimates any limitation to damage remedies when the asserted breach of contract consists of concerted activity . . . Taking the language alone, the irresistible implication would be that the District Courts were to employ their regular arsenal of remedies appropriately to the situation. That would mean, of course, that injunctive relief could be afforded when damages would not be an adequate remedy." *Sinclair,* 370 U.S. at 220 (dissenting opinion). The thrust of § 301 is surely not to invoke a double standard where, in those "suits for violation of contracts" in which unions are defendants, the courts are restricted to ineffectual remedies destructive of arbitration. Rather than cause such a "severe dislocation in the federal scheme of arbitration of labor disputes" (*International Longshoremen's Ass'n* v. *Philadelphia Marine Trade Ass'n.,* 389 U.S. 64, 77 (1967) (concurring and dissenting opinion)), Congress intended that the Norris-LaGuardia Act should be accommodated to § 301 to the limited extent necessary to permit injunctions against strikes in breach of contract.

Congress, in enacting § 301, clearly recognized that a strike over an arbitrable grievance is totally at odds with the paramount congressional policy of substituting the arbitral process for economic warfare by "promoting collective bargaining that ended with agreements not to strike." *Lincoln Mills,* 353 U.S. at 453. The expressed federal policy was that "collective bargaining contracts were made 'equally binding and enforceable on *both* parties'. . . that federal courts should enforce these agreements on behalf of *or against* labor organizations and that industrial peace can be best obtained only in that way." 353 U.S. at 454-5. (Emphasis added). *Dowd Box* strongly reiterated this dominant congressional theme (368 U.S. at 509):

> "The Labor Management Relations Act of 1947 represented a far-reaching and many-faceted legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process. It was recognized from the outset that such an effort would be purposeless unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored. Section 301(a) reflects congressional recognition of the vital importance of assuring the enforceability of such agreements."

The compelling need for mutual enforcement of labor contracts—for enforcing not only the obligation of the employer to arbitrate but the *quid pro quo* negative covenant of the union not to strike—was also underscored in the § 301 Senate Report quoted by the Court in *Lincoln Mills* (353 U.S. at 454):

> "If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an

> agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract."

Significantly, Congress in § 301 did not limit the right to pursue "suits for violation of contracts" to recovery of only "damages . . . sustained and the cost of the suit," as it did in § 303 in providing for actions by those injured by secondary boycotts. The logical implication is that Congress fully appreciated the overriding necessity of equitable enforcement of *contractual* promises freely entered into by both parties, which created no real threat to their legitimate interests, as contrasted with the dangers of resurrecting injunctions as part of a *tort* remedy in the boycott area running against unions only. Thus, "Section 302 of the House bill, the substantial equivalent of the present § 301," was described in the debates as "the section dealing with equal responsibility under collective bargaining contracts in strike actions and proceedings in district courts" which "contemplates not only the ordinary lawsuits for damages but also such other remedial proceedings, both legal and equitable, as might be appropriate in the circumstances." 353 U.S. at 455-6.

Sinclair denigrates these carefully considered policies and distinctions and, indeed, the whole substance of § 301. It asserts that Congress committed a fatal error when it sought to enforce mutual assurances of freedom from economic warfare for the contractual term, *i.e.*, it failed *expressly* to modify the Norris-La-

Guardia Act. This argument is well answered in the dissent in *Sinclair* which points out, *inter alia,* that *Lincoln Mills, Brotherhood of Railroad Trainmen* v. *Chicago River & I. R. Co.,* 353 U.S. 30 (1957), and the fair representation cases (*e.g., Syres* v. *Oil Workers International Union,* 350 U.S. 892 (1955); *Graham* v. *Brotherhood of Locomotive Firemen,* 338 U.S. 232 (1949)) all afforded injunctive relief in labor disputes despite the absence in the applicable statutes of an explicit repealer *pro tanto* of Norris-LaGuardia.[5] Moreover, a critical presupposition upon which the contention of the need for an explicit repealer is founded is that enjoining breach of contract strikes arising from arbitrable grievances was, in fact, "a part and parcel of the abuses against which the [Norris-LaGuardia] Act was aimed." *Lincoln Mills,* 353 U.S. at 458. But this presupposition is precisely what was rejected by Congress when it differentiated the remedies available in § 301 suits from those provided for in § 303 secondary boycott suits. The basis for such distinction is evident:

> "[T]he reasons behind the Norris-LaGuardia Act seem scarcely applicable to [Section 301] . . . The Act was passed primarily because of widespread dissatisfaction with the tendency of judges to en-

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[5] The critical rationale of *Chicago River,* which is particularly apropos to the instant case, was that there is a "need to accommodate two statutes, when both were adopted as a part of a pattern of labor legislation". Thus, notwithstanding the absence of any express repealer of Norris-LaGuardia in the "minor dispute" section of the Railway Labor Act, the Court held: ". . . that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved. We think that the purposes of these Acts are reconcilable." (353 U.S. at 40, 42).

join concerted activities in accordance with 'doctrines of tort law which made the lawfulness of a strike depend upon judicial views of social and economic policy.' Where an injunction is used against a strike in breach of contract, the union is not subjected in this fashion to judicially created limitations on its freedom of action but is simply compelled to comply with limitations to which it has previously agreed. Moreover, where the underlying dispute is arbitrable, the union is not deprived of any practicable means of pressing its claim but is only required to submit the dispute to the impartial tribunal that it has agreed to establish for this purpose." *Report of the Neutral Members, Special Atkinson-Sinclair Committee,* in ABA Section of Labor Relations Law Proceedings, Part II, 226, 242 (1964).

In sum, equitable validation of union no-strike pledges would do no violence to the root purpose of the Norris-LaGuardia Act, which was to prevent injunctive interference with union efforts to obtain recognition and contracts rather than to insulate unions from their duty to live up to their obligations under contracts once obtained.[6] Conversely, failure to validate such

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[6] See Stewart, *No Strike Clauses in the Federal Courts,* 59 Mich. L. Rev. 674, 676-8 (1961). This conclusion is buttressed by Frankfurter and Greene's classic study, The Labor Injunction (1930). This study, and the subsequent congressional debates preceding enactment of the Norris-LaGuardia Act, are distinctly free of criticism of injunctions against strikes in breach of contract. See Witte, *The Federal Anti-Injunction Act,* 16 Minn. L. Rev. 638 (1932). Moreover, only three of the 116 reported federal labor injunction cases compiled by Frankfurter and Greene (Appendix I), whose factual situation is disclosed in the designated federal reports, can be said to have in any way involved such a strike. (*Portland Terminal Co.* v. *Foss* (No. 41); *Kinlock Tel. Co.* v. *Local Union No. 2* (No. 53); and *A. R. Barnes & Co.* v. *Berry* (No. 94)).

obligations cannot be squared with the purposes of § 301 as this Court has uncovered them in *Lincoln Mills* and its progeny. Our arguments are thus not an appeal for changing the law that should be addressed to Congress; they are an appeal to the Court to carry where logic, fairness and consistency commands its prior conclusions about the congressional intent that underlies § 301.

III

Policy Considerations Affirm, Rather Than Negate, Congressional Authorization of Injunctions Against Strikes in Breach of Contract

The defenders of *Sinclair,* in addition to imputing a talismanic effect to the absence of an express modification of Norris-LaGuardia in § 301, also invoke various "policy" arguments for their position. They argue that breach of contract strikes involve only a "minor" problem, not "worth the substantial risk of abuse" that permission to enjoin them "may create", and which can be adequately met absent resort to equitable relief by "an arsenal of remedies available for the enforcement of contracts". Dunau, *op. cit.,* 55 Va. L. Rev. at 465-7; Bartosic, *Injunctions and Section 301: The Patchwork of Avco and Philadelphia Marine on the Fabric of National Labor Policy,* 69 Col. L. Rev. 980, 1000-1 (1969).[7] These arguments are both er-

[7] It is also argued that since many strikes in breach of contract are "wildcat" in character, i.e., not authorized by the bargaining representative, enjoining such conduct is of "uncertain practical use." Dunau, *op. cit.,* 55 Va. L. Rev. at 465; *Report of the Labor Union Members, Special Atkinson-Sinclair Committee,* in ABA Section of Labor Relations Law 1963 Proceedings, Part II, 226, 233 (1964). On the contrary, there is no basis to assert that an injunction against a wildcat strike is any less effective than other strike injunctions. An injunction against a wildcat strike benefits not only the employer but also the union and those employees who, while unsympathetic to the strikers' desire to short-circuit the arbi-

roneous and beside the point. As demonstrated above, Congress had no intention to deprive courts of their right to apply appropriate equitable remedies in § 301 "suits for violation of contracts" against unions. Nor did Congress intend, as these arguments imply, that a promise not to strike should be treated as something less than or other than a promise not to strike, or that unions should justifiably be any less committed to fulfillment of their contractual pledges than employers.

Furthermore, the policy considerations raised by the defenders of *Sinclair,* when properly viewed, only serve to confirm the wisdom of the congressional choice to permit injunctions against strikes in breach of contract. *First,* strikes in breach of contract are not a "minor" problem, either viewed in the context of their impact on the nation's industrial life, see n. 1, *supra,* or in the context of a particular strike which can be, and often is, enormously costly and disruptive for the company and its employees alike. Moreover, there is no evidence that Congress differentiated between the remedies available for contract breaches depending upon subjective evaluations of whether they are "major" or "minor."

Second, the argument that Congress could not have intended to authorize injunctions against strikes in

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tration process, nevertheless do not want to cross a picket line. In a typical wildcat strike, a few pickets, unmoved by union or company exhortations, close down a plant at great cost to both the company and its employees. Such pickets can only be effectively removed, and prevented from recongregating, by court order. See *Armco Steel Corp.* v. *Perkins,* 411 S.W. 2d 937, 64 LRRM 2439 (Ky. Ct. App., 1967). Injunctive relief thus materially assists the union in discharging its contractual no-strike obligations and reasserting its position as the exclusive bargaining agent by placing judicial sanctions behind union and company efforts to terminate the strike.

breach of contract because discipline and damages are adequate alternative remedies is likewise unpersuasive. Both discipline and damages are "patently a miserable substitute for performance." Rice, *A Paradox of Our National Labor Law,* 34 Marquette L. Rev. 233, 253 (1951). Neither provides a practical, efficient source of relief. Discharge or discipline of strikers is as likely to prolong the strike as to end it, and is often inexpedient because of the absence of qualified replacements and the adverse future employment relationships occasioned thereby. Damage actions are similarly inadequate: (1) damages are always difficult, if not impossible, to prove and the "lost orders, customers and goodwill which result from such work interruptions constitute an irreparable injury to the employer which cannot be adequately compensated for in monetary damages" (*Report of the Management Members, Special Atkinson-Sinclair Committee,* in ABA Section of Labor Relations Law 1963 Proceedings, Part II, 226, 229-30 (1964); *United Textile Workers of America, Local 120* v. *Newberry Mills Inc.,* 366 F. Supp. 366, 372 (W.D.S.C., 1965)); (2) "unions, in many cases, are willing to risk a difficult-to-calculate damage action tried years later to the vagaries of a jury for the immediate gains which might be secured by strike action, even though in violation of contract" (*Report of the Management Members, op. cit.,* 1963 Proceedings at 229); and (3) as a practical matter, employers will always be reluctant to pursue post-strike damage actions which constitute a festering source of exacerbation of union relations and which unions invariably insist must be dismissed as a *sine qua non* of future amicable collective bargaining. In sum, as Congress was well aware, the only practical way to carry out a promise not to strike is not to strike, and the only

practical way to enforce the promise is to stop the strike. No other remedy suffices.

Third, the specter of perplexing questions of contract interpretation and of potential abuses of authority to issue injunctions against breach of contract strikes is a mirage. Whatever the violation alleged, whoever alleges it, and whatever the relief sought in a § 301 suit, questions of contract interpretation, sometimes complex and sometimes not, will arise for court decision. There is no basis, historical or otherwise, for the assertion that the courts are incompetent to deal with these questions or to determine accurately, in the occasional case where the issue is seriously contested and difficult, whether or not a strike is in breach of contract. And there is ample authority in this Court, supported by Rule 65 of the Federal Rules of Civil Procedure, to lay down any ground rules necessary to prevent abuses. See the dissent in *Sinclair,* 370 U.S. at 228-9, and *International Longshoremen's Ass'n* v. *Philadelphia Marine Trade Ass'n,* 389 U.S. 64 (1967). There is similarly no reason to disparage state court involvement in these matters. *Dowd Box* exemplifies the trust of Congress and this Court that the state courts will, within the limits of federal substantive law and subject now to removal to the federal courts under *Avco,* responsibly exercise the concurrent jurisdiction bestowed on them to hear and decide suits for breach of contract, just as they now responsibly exercise concurrent jurisdiction in cases involving strike violence and related conduct (e.g., *UAW* v. *Wisconsin ERB,* 351 U.S. 266 (1956); *Youngdahl* v. *Rainfair, Inc.,* 355 U.S. 121 (1957)). As pointed out in *McCarroll* v. *Los Angeles District Council of Carpenters, supra,* ". . . federal courts are no more expert than state courts in the interpretation of contracts."

Finally, the defenders of *Sinclair* concede that Norris-LaGuardia and § 301 must be accommodated after all, to permit the courts (a) to enjoin strikes in defiance of cease and desist arbitral awards against breach of contract strikes and (b) to enjoin strikes in opposition to arbitrators' awards on the merits of grievances. Dunau, *op. cit.*, 55 Va. L. Rev. at 473-77; Bartosic, *op. cit.*, 69 Col. L. Rev. at 1011-17. See, *New Orleans Steamship Ass'n* v. *ILA Local 1418*, 389 F.2d 369 (5th Cir.), *cert. denied*, 393 U.S. 828 (1968); *Philadelphia Marine Trade Ass'n* v. *ILA Local* 1291, 365 F.2d 295, 368 F.2d 932 (1966), *reversed*, 389 U.S. 64 (1967). This concession constitutes a candid admission that *Avco* coupled with *Sinclair* results in frustration of the congressional intent underlying § 301. It is a retreat to new ground to set up a new line of defense for *Sinclair*. In fact there is no essential difference between the rationale of this concession and the position taken by the dissenters in *Sinclair*, for they both support nothing more or less than injunctions issued by courts against strikes in breach of contract, in order to uphold the purpose of § 301 to assure the viability and integrity of the arbitration process.[8] A court injunction issued prior to

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[8] With the dissent in *Sinclair*, compare the following statements in Dunau, *op. cit.*, 55 Va. L. Rev. at 474, 477:

> "The decree [enjoining the strike] will clearly clash with the words of section 4(a) of the Norris-LaGuardia Act. But it is axiomatic that statutory interpretation, while it indispensably begins with statutory words, cannot stop there. Further inquiry is essential to ascertain whether the literal reading fits the rationale of the Norris-LaGuardia Act and LMRA section 301."
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> • • •
>
> "Where two statutory directives collide, a solution which reconciles both is to be preferred to a result which wholly sacrifices either."

an arbitrator's award in order to prevent a strike in defiance of the arbitration process upholds the arbitration principle not one whit less, and is no less proper under § 301, than a court injunction to prevent defiance of an award.

Moreover, the proposed post-award strike injunctions, which may appear on first blush to be an attractive compromise to make the *Avco-Sinclair* distortion of § 301 palatable, will seldom have that effect. The banner of arbitration is little advanced if the relatively rare case in which there is a strike against an arbitrator's award can be reached by a court injunction while the frequent case in which the strike seeks to avoid arbitration altogether cannot be reached. Additionally, the suggested rule that courts be permitted to enjoin a pre-arbitration strike only after an arbitrator has ruled on it will be of little practical value. Very few collective bargaining contracts provide—and few companies and unions are in a position to provide—for the kind of instantaneous choice and advent of an arbitrator that would be required to give the suggestion any significant practical content. Thus a ruling that an arbitrator's cease and desist order must precede a court injunction would require the renegotiation of many thousands—almost all—of the country's no strike/arbitration agreements. Whether these negotiations could or would achieve the desired results is highly problematical. Congress cannot be supposed to have intended that such negotiations should precede the effectuation of § 301.

CONCLUSION

For the reasons stated herein, as well as those presented by the petitioner and the dissent in *Sinclair,* the decision of this Court in *Sinclair* should be overruled, and the decision of the court below should be reversed.

Respectfully submitted,

WILLIAM H. WILLCOX
Gall, Lane, Powell and Kilcullen
1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

LAWRENCE M. COHEN
Lederer, Fox and Grove
111 West Washington Street
Chicago, Illinois 60602

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No. 768

IN THE

Supreme Court of the United States

Term, 1970

THE BOYS MARKETS, INC.,

Petitioner,

v.

RETAIL CLERK'S UNION # 770,

Respondent.

BRIEF AMICUS CURIAE
of
Associated Industries of New York State, Inc.
In Support of Petitioner

GEORGE R. FEARON
600 Monroe Building
Syracuse, New York 13202
Attorney for Amicus Curiae

Of Counsel:
CHARLES E. COONEY, JR.
600 Monroe Building
Syracuse, New York 13202

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IN THE

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v.

RETAIL CLERK'S UNION # 770,

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BRIEF AMICUS CURIAE
of
Associated Industries of New York State, Inc.
In Support of Petitioner

QUESTION PRESENTED

Whether a Federal District Court may temporarily enjoin a labor union strike in violation of a collective bargaining contract's no-strike clause.

INTEREST OF THE AMICUS CURIAE

This brief is filed pursuant to Rule 42 of the Revised Rules of the Supreme Court of the United States. Both counsel for petitioner and counsel for respondent have stated that the respective parties consent to the filing of this brief.

Associated Industries of New York State, Inc. has since its founding in 1914 served as the "Voice of Industry" in New York State. The Association has approximately 1,800

member companies having offices and plants in every part of the State of New York. Both manufacturing and non-manufacturing companies, representing total business activities of many billions of dollars annually, are included within the membership. While Associated Industries numbers among its members many of the largest corporations in America, the vast majority of its membership is composed of companies having a payroll of less than 200 employees. It therefore speaks for the small employer as well as the large and particularly so in the present situation where it is the small employer who is without adequate redress under the present state of the law.

The Association is filing this brief to emphasize to the Court the extremely important nature of this case and the effect that it will have not only on employers in New York State but throughout the nation in the event that the relief requested is not afforded.

ARGUMENT

Under the present state of the law as a result of the Sinclair case (Atkinson v. Sinclair Refining Company, 370 U.S. 195 (1962)) employers who negotiate a collective bargaining agreement containing a no-strike clause are precluded from obtaining temporary injunctive relief in federal district courts enjoining a union from striking over an arbitratable grievance in the contract. Presumably as a result of Avco (Avco Corp. v. Aero Lodge No. 735, 390 U.S. 557 (1968)), an employer's rights to obtain such injunctive relief in the appropriate state court are severely circumscribed by the fact that the District Courts upon removal will dissolve the State court injunction and will not remand the litigation to the State court.

It is submitted that these holdings vitiate the true purpose of Section 301 of the Taft-Hartley Act (61 Stat. 156 (1947), 29 U.S.C. Section 185 (1958). This was eloquently pointed out by Justice Traynor in McCarroll v.

Los Angeles County District Council of Carpenters, 49 Cal. 2d 45, 315 P. 2d 322, 332 (1957). Cert. Denied. 355 U. S. 932 (1958) where he said,

> "The principal purpose of Section 301 was to facilitate the enforcement of collective bargaining agreements by making unions sueable and entities in the Federal Courts and thereby to remedy the one-sided character of existing labor legislation..... We would give altogether too ironic a twist to this purpose if we held that the actual effect of the legislation was to abolish in State courts equitable remedies that had been available and leave an employer in a worse position in respect to the effective enforcement of his contract than he was before the enactment of Section 301."

It is argued that not only is Justice Traynor's rational applicable to enforcement in State's courts but should be equally applicable to enforcement by the Federal District Courts.

As a matter of fact logic and common sense dictate that if there are to be uniform doctrines of Federal Labor Law to be fashioned judicially in suits brought under Section 301 (Textile Workers v. Lincoln Mills, 353 U. S. 448) it is important that the disability of the Federal District Courts be removed. This was pointed out in the Sinclair (370 U. S. 195, 226) case in the dissenting opinion of Justice Brennan:

> "On the other hand if, as today's literal reading suggests and as a leading state decision holds, States remain free to apply their injunctive remedies against concerted activities in breach of contract, the development of a uniform body of federal contract law is in for hard times. So long as state courts remain free to grant the injunctions unavailable in federal courts, suits seeking relief against concerted activities in breach of contract will be channeled to the States whenever possible. Ironically, state rather than federal courts will be preferred instruments to

protect the integrity of the arbitration process, which Lincoln Mills and the Steelworkers decisions forged into a kingpin of federal labor policy. Enunciation of uniform doctrines applicable in such cases will be severely impeded. Moreover, the type of relief available in a particular instance will turn on fortuities of locale and susceptibility to process - depending upon which states have anti-injunction statutes and how they construe them."

While the employer still has a technical action for damages arising from a breach of a no-strike clause in a collective bargaining agreement, it is submitted that the relief is illusory. Particularly for a small employer even a short strike is a crippling experience and to obtain its end an employer is quite willing and usually does agree to waive any claim against the union for damages arising out of its violation of a no-strike clause in the collective bargaining agreement.

The inequality of the present posture of Court decisions in this regard is patent. On one hand the Court states that the employer's agreement to arbitrate is "the quid pro quo" for the union's agreement not to strike and therefore the employer's agreement is specifically enforceable, but on the other hand, the union's agreement not to strike is not specifically enforceable. Therefore in a collective bargaining agreement containing a no-strike provision the union's promise not to strike is in a practical sense illusory and therefore true mutuality of obligation is absent. This disparity of rights under present decisional law has been criticized by legal writers. See Aaron, Labor Injunction Reappraised, 10 U. C. L. A. Law Review 292, at pp. 342-3 (1963) and Gregory, The Law of Collective Agreement, 57 Michigan Law Review 635 (1959).

Nor is this view of mutuality of obligation a new concept. Recognition that collective bargaining agreements must be

valid, binding and easily enforceable by either party was recognized by the Congress at the time of passage of the Taft-Hartley Act.

> "If unions can break agreements with relative impunity, then such agreements do not tend to stablize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.
>
> "Consequently, to encourage the making of agreements and to promote industrial peace through faithful performance by the parties, collective agreements affecting interstate commerce should be enforceable in the Federal Courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce."
>
> (Senate Report No. 105, 80th Congress, 1st Session, page 16).

The only way to achieve equality of employer and union in regard to the enforceability of collective bargaining agreements is to make such contracts equally binding and enforceable on both parties. This may be achieved by allowing employers in a proper case to apply to District Court for an injunction temporarily enjoining a union strike in violation of a collective bargaining contract containing a no-strike clause.

CONCLUSION

It is respectfully submitted that the judgment of the Circuit Court of Appeals be reversed.

Dated: February 20, 1970

Yours, etc.

GEORGE R. FEARON
600 Monroe Building
Syracuse, New York 13202
Attorney for Amicus Curiae

Of Counsel:
CHARLES E. COONEY, JR.
600 Monroe Building
Syracuse, New York 13202

SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 768

THE BOYS MARKETS, INC.,
Petitioner,

vs.

RETAIL CLERK'S UNION, LOCAL 770,
Respondent.

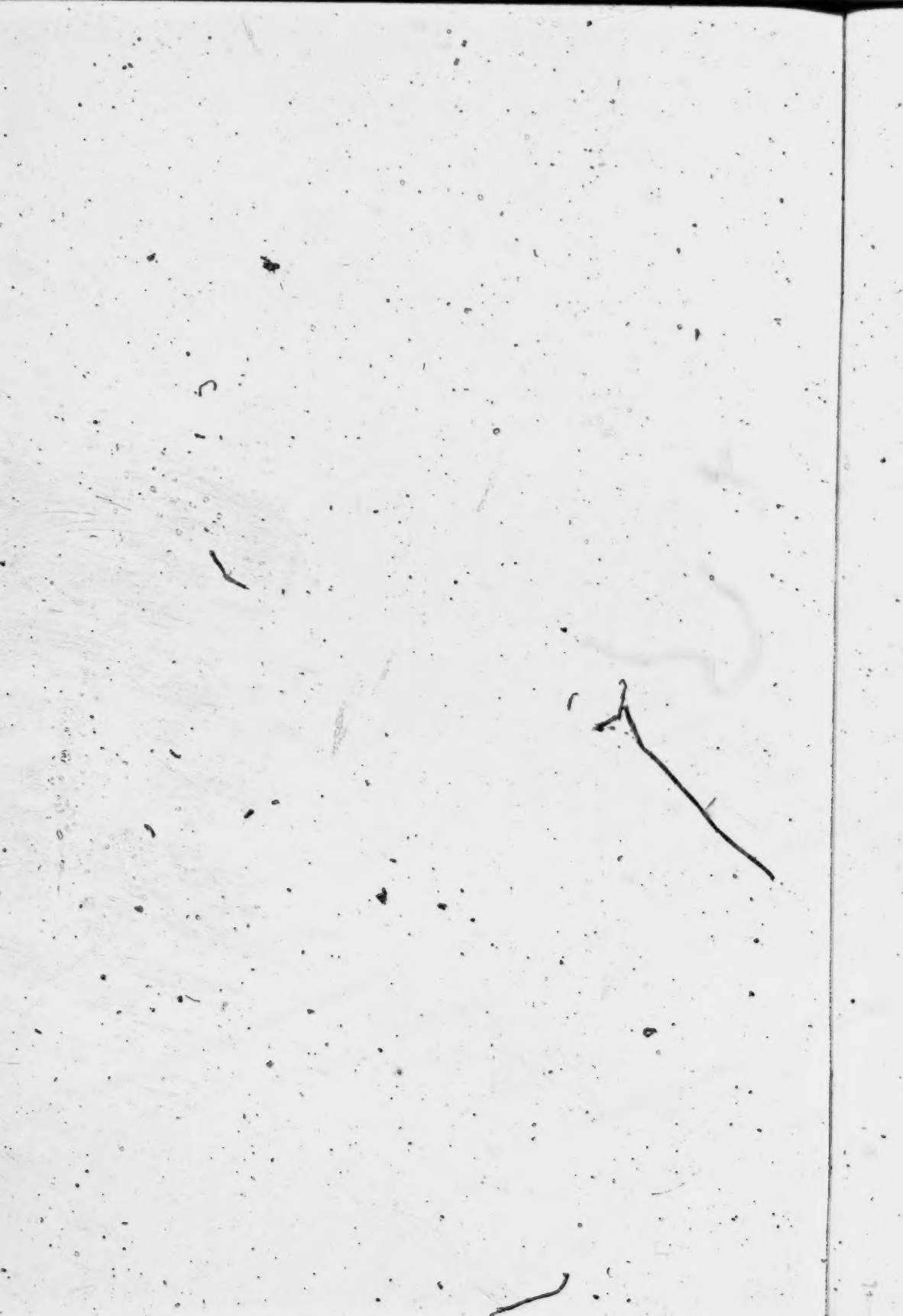
On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PEABODY COAL COMPANY, AMICUS CURIAE, IN SUPPORT OF PETITIONER

HAROLD I. ELBERT
705 Olive Street
St. Louis, Missouri 63101
Attorney for Peabody Coal Company

Of Counsel
SUSMAN, WILLER, RIMMEL & ELBERT
705 Olive Street
St. Louis, Missouri 63101
and
JOSEPH TOUHILL
301 North Memorial Drive
St. Louis, Missouri 63102

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477



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IN THE

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PEABODY COAL COMPANY, AMICUS CURIAE, IN SUPPORT OF PETITIONER

I

INTEREST OF AMICUS CURIAE

Peabody Coal Company produces a substantial amount of the coal required to generate electricity in the midwest, southeast, southwest and northwest regions of the United States. It operates approximately fifty mines, including its Bee-Veer Mine in Randolph and Macon Counties in the State of Missouri. The employees at that mine are rep-

resented by the International Union, United Mine Workers of America and its appropriate district and local. On October 14, 1968, Peabody and the Union entered into a contract which provides for settlement of local and district disputes by arbitration, which reads in part as follows:

> "The United Mine Workers of America and the operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the 'Settlement of Local and District Disputes' section of this agreement unless national in character in which event the parties shall settle such disputes by free collective bargaining as heretofore practiced in the industry, it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts."

The agreement provides that seniority is by "mine" and promotion to permanent vacancies and new jobs are to be filled by mine seniority at each mine.

In May of 1969 Peabody opened a new mine in Randolph and Chariton Counties for the production of coal. This mine is called the Prairie Hill Mine, is some twelve miles from the Bee-Veer Mine and does not use any of the facilities and machinery of said Bee-Veer Mine and involves coal lands, machinery, preparation facilities, transportation facilities, offices, supervision and other facilities which are separate and apart from said Bee-Veer Mine.

According to the Union, the Bee-Veer and Prairie Hill Mines are not separate mines; that employees of the Bee-Veer Mine are entitled to exercise their seniority to bid on jobs at the Prairie Hill Mine and that there should be one seniority list for both mines. Peabody asserted that they are separate mines; that there should be separate seniority

lists for each mine and that it was entitled to hire employees of its own choosing without regard to seniority at the Bee-Veer Mine.

Instead of resolving the matter through arbitration, the Union picketed the Prairie Hill Mine and caused a work stoppage. Peabody sued for an injunction in the Circuit Court of Randolph County, Missouri,[1] based on the Union's breach of the implied no-strike clause.[2]

The Circuit Court granted Peabody a temporary injunction. Thereafter, the Union removed the case to the federal court[3] and filed a motion to dissolve the injunction based on **Avco Corporation.**[4] The injunction was dissolved by the District Court and Peabody appealed to the Court of Appeals for the Eighth Circuit.[5]

Immediately after the injunction case was removed to the federal court, Peabody filed suit in that court for specific performance of the Union's obligation to submit the matter to arbitration.[6]

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[1] **Peabody Coal Company v. Barnes, et al.**, No. 21230, Circuit Court, Randolph County, Missouri.

[2] **Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Co.**, 369 U. S. 95, 82 S. Ct. 571 (1962).

[3] **Peabody Coal Company v. Paul Barnes, et al.**, United States District Court, Eastern District of Missouri, Northern Division, No. N-69-C-24.

[4] **Avco Corp. v. Aero Lodge 735, IAM**, 390 U. S. 557, 88 S. Ct. 1235 (1968).

[5] **Peabody Coal Company v. Paul Barnes, et al.**, United States Court of Appeals for the Eighth Circuit, No. 20152. (The Court has granted Peabody 40 days after the decision in this case to file the appendix and brief.)

[6] **Peabody Coal Company v. United Mine Workers of America, Local 7688, et al.**, United States District Court, Eastern District of Missouri, Northern Division, No. N-69-C-25.

Peabody is vitally interested in a resolution of the issues presented to this Court because it becomes involved in cases such as the one outlined above from time to time and the inability to obtain injunctive relief pending resolution of its differences with the Union results in substantial loss of production which cannot be recompensed by a damage award against the Union. If it does not have ability to obtain injunctive relief, it will have to either (a) accede to the Union's demands or (b) remain closed and refuse to process any grievances until the men return to work. Neither of these alternatives appeals to Peabody. It believes that it should get the benefit of its bargain—the right to have employees at work during the entire term of the collective bargaining agreement without recourse to work stoppages. After all, isn't this the reason why an employer signs a collective bargaining agreement?[7] Of this, more will be said later.

We submit that **Sinclair Refining Co. v. Atkinson**, 370 U. S. 195, 82 S. Ct. 1328 (1962), was incorrectly decided and should be overturned. An analysis of American Labor Law and policy is evidenced by Acts of Congress and leading decisions of this Court supports such conclusion. By tracing the development of our labor policy from Norris-LaGuardia, 47 Stat. 70, 29 U. S. C., Section 101 et seq., to **Sinclair**, we shall demonstrate that **Sinclair** is a departure from established labor policy and should and must be overruled.

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[7] **Textile Workers Union v. Lincoln Mills**, 353 U. S. 448, 77 S. Ct. 912 at page 454 (1957) and Senate Report No. 105, 80th Cong., 1st Session, p. 16.

II

ARGUMENT

The question presented to this Court has been concisely set forth in Petitioner's Brief. Our argument shall present this question in two parts. The first shall deal with the right of the United States District Courts to enjoin strikes where the action originates in those Courts and the second shall deal with the issue of whether United States District Courts must after removal of an action from a state court in which an injunction was granted against a labor organization dissolve such injunction.

(a)

The United States District Courts have jurisdiction under Section 301 of the Labor-Management Relations Act of 1947, as amended, 29 U. S. C., Section 185, to enjoin strikes and work stoppages by labor organizations in violation of their solemn obligation not to strike contained in their collective bargaining agreements and Section 4 of the Norris-LaGuardia Act, 29 U. S. C., Section 104, does not bar the issuance of such an injunction. Accordingly, the decision of this Court in Sinclair Refining Co. v. Atkinson, *supra*, should and must be overruled.

No-strike clauses may be express or implied. In the instant case, The Boys Markets, Inc. by use of the collective bargaining process obtained an express no-strike clause under the terms of which the Union agreed to resolve matters by use of the "Adjustment and Arbitration" provision set forth in the parties labor agreement (App. 25-29). As part and parcel of this provision, it agreed not to strike over matters subject to adjustment and arbitration. The pertinent clause reads thus:

> "2. **Work Stoppages.** Matters subject to the procedures of this Article shall be settled and resolved in

the manner provided herein. During the term of this Agreement, there shall be no cessation or stoppage of work, lock-out, picketing or boycotts, except that this limitation shall not be binding upon either party hereto if the other party refuses to perform any obligation under this Article or refuses or fails to abide by, accept or perform a decision or award of an arbitrator or board'' (App. 28).

Other employers have obtained implied no-strike clauses by agreeing to provisions for compulsory arbitration through the process of free collective bargaining.[8]

Contracts containing an express or implied no-strike clause give the Union the right to enjoin an employer from locking out his employees in order to resolve a grievance. Unions seek grievance and arbitration provisions in collective bargaining agreements to avoid economic warfare as means of settling disputes. By doing so they recognize that grievance and arbitration provisions have a therapeutic value to them. As a consequence, they accede to employer requests for no-strike clauses or compulsory arbitration.

Breach or violation of the no-strike provision of a labor agreement cannot be tolerated or condoned. Indeed, it is difficult to envision any action or activity more likely to

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[8] **Local 174, Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Lucas Flour Co.**, 369 U. S. 95, 82 S. Ct. 571 (1962). In that case the labor agreement provided for arbitration. The union, instead of following the grievance and arbitration provisions of the collective bargaining agreement, struck the company. Although the agreement did not contain a no-strike clause, the employer sued for damages claiming that the strike was a violation of the collective bargaining agreement and recovered damages in the state court. This Court affirmed and held that the compulsory arbitration provision implied a no-strike clause. It said: "Even more in point, a contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare" (369 U. S. at page 105).

reduce a labor agreement to a worthless scrap of paper, to irreparably impair the parties' relationship and more inimical to the economic best interests of company, union and workers alike, than the indulgence in its violation.

This Court has recognized that:

> "It is a matter of industrial history that stoppages of work because of disciplinary penalties against individuals, or because of failure to pay the rates claimed, or because of the promotion or layoff of one employee rather than another, or for similar reasons, have been frequent occurrences."[9]

Instances of the type mentioned above are typical of the items that give rise to work stoppages in violation of express or implied no-strike clauses. They involve interpretation of terms of labor agreements or are factual situations which are best solved by the arbitration process rather than by resorting to economic warfare. Clearly, the Norris-LaGuardia Act was never designed to protect unions or individuals who struck in violation of their solemn contractual obligations.

Norris-LaGuardia[10] was enacted in 1932. At that time individuals had difficulty in engaging in concerted activity and in joining labor unions. The public policy of that law is expressed in the preamble as follows:

> "In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

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[9] **Association of Westinghouse Salaried Employees v. Westinghouse Electric Co.**, 348 U. S. 437, 75 S. Ct. 489 (1955) at page 457.

[10] 47 Stat. 70, 29 U. S. C. 101 et seq.

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted."

An analysis of the foregoing indicates that the Norris-LaGuardia Act was passed to give individuals the right to decline or associate with their fellow workers for the purpose of collective bargaining free from interference, restraint and coercion.

In **United States v. Hutchinson,**[11] defendants, who were officers of the Carpenters Union, were indicted for violation of the Sherman Act because they had engaged in a jurisdictional dispute with the Machinists over the removal of machinery. The Carpenters refused arbitration, struck and circularized letters asking union members and their friends to refrain from buying Anheuser-Busch beer.

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[11] 312 U. S. 219, 61 S. Ct. 463, 85 L. Ed. 788 (1941).

Demurrers to the indictment were sustained and the government appealed.

The court pointed out that the Clayton Act was designed to remove certain trade union activities from the ambit of the Sherman Act; that for twenty years unions had worked for the passage of the Clayton Act; that the courts unduly restricted the Clayton Act by restricting the scope of that Act to trade union activities directed against an employer by his own employees and that this view caused agitation which "again led to legislation and in 1932 Congress wrote the Norris-LaGuardia Act."[12]

This Court pointed out that in determining whether trade union conduct violated the Sherman Act, the Court had to consider both the Clayton and Norris-LaGuardia Acts. It said:

> "The Norris-LaGuardia Act removed the fetters upon trade union activities which according to judicial construction § 20 of the Clayton Act had left untouched, by still narrowing the circumstances under which the federal court could grant injunctions in labor disputes. More especially the Act explicitly formulated the 'public policy of the United States' in regard to the industrial conflict and by its light established that the allowable area of union activity was not to be restricted as it had been in the Duplex case, to the immediate employer-employee relation. Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct."[13]

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[12] **United States v. Hutchinson,** 312 U. S. 219, 61 S. Ct. 463, 85 L. Ed. 788 (1941) at page 231.

[13] **United States v. Hutchinson,** supra, page 231.

This Court then said:[14]

> "The relation of the Norris-LaGuardia Act to the Clayton Act is not that of a tightly drawn amendment to a technically phrased tax provision. **The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction. This was authoritatively stated by the House Committee on the Judiciary. 'The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act, October 15, 1914, 38 Stat. L. 738, which act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent.'** H. Rep. No. 669, 72d Congress, 1st Session, p. 3. The Norris-LaGuardia Act was a disapproval of Duplex Printing Press Co. v. Deering, supra, and Bedford Cut Stone Co. v. Journeyman Stone Cutters' Association, 274 U. S. 37, 47 S. Ct. 522, 71 L. Ed. 916, 54 A. L. R. 791, as the authoritative interpretation of § 20 of the Clayton Act, for Congress now placed its own meaning upon that section. The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light § 20 removes all such allowable conduct from the taint of being 'violations of any law of the United States', including the Sherman Law." (Emphasis added.)

Norris-LaGuardia was not designed to prevent an employer from requiring a union to live up to its solemn obligations. Its objective was to give individuals an opportunity to organize and engage in collective bargaining.

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[14] **United States v. Hutchinson**, supra, pages 235-236.

To accomplish this it restricted the power of the federal courts to grant injunctions.

Section 4[15] of that Act prohibited injunctions by courts of the United States in labor disputes as defined in the Act. Labor disputes was defined as including any controversy "concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."[16]

Norris-LaGuardia was not concerned with the enforcement of collective bargaining agreements. Rather, it was designed to give individuals an opportunity to engage in activity designed to result in a collective bargaining agreement. It must be considered in the light of the mischief it sought to remedy, later acts of Congress and decisions of this Court.

In 1935, three years after passage of the Norris-LaGuardia Act, Congress passed the Wagner Act.[17] The policy of that Act was to give workers an opportunity to engage in collective bargaining. In the "Findings and Policy" Congress said:

> "* * * It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting

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[15] 47 Stat. 70, 29 U. S. C. 104.

[16] 47 Stat. 73, 29 U. S. C. 113.

[17] 49 Stat. 449, 29 U. S. C. 151 et seq.

> the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[18]

Under the terms of that Act any employer for the first time was required to engage in collective bargaining with the representatives of his employees.[19]

The Wagner Act defined the term "labor dispute" in language substantially identical to the language of Norris-LaGuardia defining that term.[20]

In 1947 the Taft-Hartley Amendments to the Wagner Act were passed.[21] Section 301 of the Taft-Hartley Act provided for suits against unions. The pertinent parts of that section read as follows:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> "(b) Any labor organization which represents employees in an industry affecting commerce . . . and any employer whose activities affect commerce . . .

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[18] 49 Stat. 449, 29 U. S. C. 151.

[19] 49 Stat. 449, 29 U. S. C. 158(a)(5).

[20] The Wagner Act inserts the word "tenure" after the word "terms" in line two of the definition. Otherwise, the two definitions are identical. 49 Stat. 450, 29 U. S. C. 152(9) and 47 Stat. 73, 29 U. S. C. 113(c).

[21] 61 Stat. 136.

shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."[22]

This Court was first called upon to consider whether the Act was substantive or procedural in **Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.**[23] In that case three members of this Court indicated that § 301 did not create a federal substantive law and that state law was controlling. One member of the Court did not participate, two members concurred with the opinion for other reasons and two members of the Court dissented. As a consequence of that split decision, the issue was presented to the Court two years later in **Textile Workers Union of America v. Lincoln Mills.**[24]

In that case there were several grievances over work loads and work assignments. The collective bargaining agreement of the parties set forth a grievance and arbitration procedure and a no-strike clause. After exhausting the grievance procedure, the union requested arbitration and the employer refused to comply with that request.

Suit was filed to compel specific performance of the employer's obligation to arbitrate. The District Court ordered the employer to arbitrate and by a divided vote

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[22] 61 Stat. 156, 29 U. S. C. 185(a) and (b).

[23] 348 U. S. 437, 75 S. Ct. 489 (1955).

[24] 353 U. S. 448, 77 S. Ct. 912 (1957).

the Court of Appeals reversed. This Court granted certiorari. It concluded that Section 301(a) was substantive and that Section 301(b) was procedural. The Court concluded that federal substantive law should apply and said:

> "* * * We conclude that the substantive law to apply under § 301(a) is federal law which the court must fashion from the policy of our national labor laws."[25]

In reaching the foregoing conclusion, this Court relied on the Senate Report with respect to passage of the Taft-Hartley Act which reads in part thus:

> "Congress was also interested in promoting collective bargaining that ended with agreements not to strike. The Senate Report, *supra*, p. 16, states:
>
> 'If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.
>
> 'Consequently, to encourage the making of agreements and to promote industrial peace through faithful performancy by the parties, collective agreements affecting interstate commerce

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[25] **Textile Workers Union of America v. Lincoln Mills**, 353 U. S. 448, 77 S. Ct. 912 at page 451.

should be enforceable in the Federal courts. Our amendment would provide for suits by unions as legal entities and against unions as legal entities in the Federal courts in disputes affecting commerce.' "[26]

Although specific performance of an agreement to arbitrate is a mandatory injunction compelling an employer to arbitrate, this Court rejected the argument that the Norris-LaGuardia Act prohibited such relief. In doing so it recognized that a literal reading might bring the case within the scope of that Act. It said:

> "Though a literal reading might bring the dispute within the terms of that Act . . . we see no justification in policy for restricting § 301(a) to damage suits leaving specific performance of a contract to arbitrate grievance disputes to the inapposite procedural requirements of that Act."[27]

In **Textile Workers**, this Court recognized that the Norris-LaGuardia Act did not prevent all injunctions. It cited three cases involving racial discrimination. Two of those cases arose under the Railway Labor Act and the third arose under the Labor-Management Relations Act. In each case this Court held that Norris-LaGuardia did not prevent the Court from granting injunctions in cases involving racial discrimination under the Railway Labor Act and the Labor-Management Relations Act.[28]

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[26] **Textile Workers Union of America v. Lincoln Mills**, supra, at page 454.

[27] **Textile Workers Union of America v. Lincoln Mills**, supra, at page 458.

[28] **Virginia R. Co. v. System Federation**, 300 U. S. 515, 57 S. Ct. 592 (1937); **Graham v. Brotherhood of Firemen**, 338 U. S. 232, 70 S. Ct. 14 (1949) and **Syres v. Oil Workers International Union**, 350 U. S. 892, 76 S. Ct. 152 (1955).

During the same term at which this Court decided **Lincoln Mills**, supra, it held that the Norris-LaGuardia Act was not applicable to a minor dispute arising under the Railway Labor Act and that a railroad was entitled to enjoin a strike arising out of that dispute. **Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Company.**[29]

In that case the parties were in disagreement over twenty-one grievances. Nineteen involved claims for additional compensation, one involved a claim for reinstatement to a higher position and one was for reinstatement to the employ of the carrier. When the parties could not agree on disposition of the grievances, the union called a strike. Injunctive relief was then sought by the railroad in the federal court. After granting a preliminary injunction, the District Court vacated its order because it was of the opinion that the Norris-LaGuardia Act deprived it of jurisdiction to grant relief. The Court of Appeals reversed and this Court granted certiorari.

The Railway Labor Act sets forth certain provisions with respect to minor disputes that are typical of the provisions of a collective bargaining agreement providing for compulsory arbitration. This Court held that Norris-LaGuardia did not prevent the railroad from obtaining an injunction in the federal court. It said:

> "We hold that the Norris-LaGuardia Act cannot be read alone in matters dealing with railway labor disputes. **There must be an accommodation of that statute and the Railway Labor Act so that the obvious purpose in the enactment of each is preserved.** We think that the purposes of these acts are reconcilable"[30] (Emphasis added).

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[29] 353 U. S. 30, 77 S. Ct. 63 (1957).

[30] 353 U. S. 30 at page 40.

The Court then discussed at length the purposes of each act to demonstrate that they could be reconciled. It said:

> "In adopting the Railway Labor Act, Congress endeavored to bring about stable relationships between labor and management in this most important national industry. * * *
>
> "The Norris-LaGuardia Act, on the other hand, was designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining. The Act aimed to correct existing abuses of the injunctive remedy in labor disputes. Federal courts had been drawn into the field under the guise either of enforcing federal statutes, principally the Sherman Act, or through diversity of citizenship jurisdiction. In the latter cases, the courts employed principles of federal law frequently at variance with the concepts of labor law in the States where they sat. Congress acted to prevent the injunctions of the federal courts from upsetting the natural interplay of the competing economic forces of labor and capital. Rep. LaGuardia, during the floor debates on the 1932 Act, recognized that the machinery of the Railway Labor Act channeled these economic forces, in matters dealing with railway labor, into special processes intended to compromise them. Such controversies, therefore, are not the same as those in which the injunction strips labor of its primary weapon without substituting any reasonable alternative."[31]

A careful analysis of **Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Company**, supra, indicates it is directly in point in the instant case and as this Court accommodated the Norris-LaGuardia Act to

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[31] 353 U. S. 30 at pages 40 and 41.

the Railway Labor Act, it should accommodate the Norris-LaGuardia Act to the National Labor Relations Act.

By virtue of the provisions of the Railway Labor Act minor disputes are subject to adjustment as provided in the Act and cannot result in a strike. In cases where a labor agreement provides for compulsory arbitration, disputes are settled by virtue of the arbitration procedure and a union should not be entitled to strike in an effort to gain by the use of economic force that which it may or may not have gained by arbitration. In this way Norris-LaGuardia is accommodated to the Labor-Management Relations Act. We believed that this Court would so declare the law when in 1960 it decided the so-called trilogy cases[32] which held that the federal courts in determining whether a dispute is arbitrable are confined to a determination of whether the dispute submitted is on its face subject to arbitration and that it should not determine the merits of the dispute or decide whether it is so frivolous and patently baseless that it is not subject to arbitration.

Accordingly, when **Sinclair Refining Co. v. Atkinson,**[33] was presented to this Court, the labor bar and legal scholars believed that Norris-LaGuardia would be accommodated to the Labor-Management Relations Act and that this Court would uphold an employer's right to injunctive relief when a union struck in violation of its duty to arbitrate and its express or implied no-strike clause.

In **Sinclair,** supra, the complaint for injunction alleged that the collective bargaining agreement of the parties

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[32] **United Steelworkers of America v. American Manufacturing Company,** 363 U. S. 564, 80 S. Ct. 343 (1960); **United Steelworkers of America v. Warner and Gulf Navigation Company,** 363 U. S. 374, 80 S. Ct. 1347 (1960) and **United Steelworkers of America v. Enterprise Wheel and Car Corp.,** 363 U. S. 593, 80 S. Ct. 1358 (1960).

[33] 370 U. S. 195, 82 S. Ct. 1328 (1962).

contained a clause under the terms of which the union could not strike; that over a 19 month period the union had engaged in nine separate work stoppages, all of which grew out of grievances subject to arbitration. The District Court denied injunctive relief. Its decision was affirmed by the Court of Appeals and this Court granted certiorari.

This Court held that the parties were engaged in a labor dispute within the meaning of the Norris-LaGuardia Act and that the Congress by enactment of Section 301 did not repeal the Norris-LaGuardia proscriptions against injunctions in labor disputes. Much of the Court's decision was based on the fact that the legislative history of Section 301 did not indicate a determination to repeal Norris-LaGuardia.

We submit that such determination begs the issue which is whether Norris-LaGuardia should be accommodated to the Labor-Management Relations Act in those cases where the parties labor agreement calls for compulsory arbitration and contains an express or implied no-strike clause.

Norris-LaGuardia remains effective in cases other than the type described above. Congress decided by the passage of Section 301 to permit the courts to fashion a federal substantive law. In fashioning such law the courts are warranted in accommodating Norris-LaGuardia to the Labor-Management Relations Act to establish a uniform body of federal law which gives employers the benefit of their bargain and compels unions to live up to their obligations.

This Court's conclusion that Norris-LaGuardia's anti-injunction provisions remain applicable to Section 301 suits is indefensible on public policy grounds. The absence of an injunctive remedy hampers the general policy of Section 301 that collective bargaining agreements should be enforceable. Because of **Sinclair** employers have

been unable to enforce no-strike clauses in the federal courts. Employers who have bargained for the security of a constant labor force are unable to enjoy the benefits of their bargain. The Court's holding conflicts with the very strong policy favoring arbitration of labor disputes that this Court has read into Section 301. In the absence of an injunctive remedy for breach of an express or implied no-strike clause, effective use of any contractual arbitration procedure is seriously hampered. Arbitration is extremely difficult in the midst of a strike.

This Court has been willing to construe the words of Norris-LaGuardia to require specific performance of agreements to arbitrate grievances. These same policy considerations dictate that a no-strike clause be enforced by injunctive relief. The injunction is incidental to the obligation to arbitrate. It merely retains the status quo until the arbitration is terminated. Once this occurs the union has either won or lost the dispute. If it won, then there is no need to strike. In the event it loses, it should abide by the decision and not strike to reverse it.

United States v. Hutchinson and **Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Company**, supra, have accommodated Norris-LaGuardia to the Clayton and Sherman Acts and to the Railway Labor Act. Such accommodations should be made in the instant case. Further, the strong public policy for arbitration of labor disputes as evidenced by this Court in the cases heretofore mentioned supports our conclusion. In **Textile Workers v. Lincoln Mills**, supra, this Court said:

> "Plainly the agreement to arbitrate grievances is the quid quo pro for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor

organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf or against labor organizations and that industrial peace can be best obtained only in that way."[34]

We submit that industrial peace can only be obtained by injunctive relief for breach of a no-strike clause; that Congress when it created a Section 301 remedy did not intend to deprive employers of their right to injunctive relief in cases involving breaches of no-strike clauses and that American labor policy is best served by accommodating Norris-LaGuardia to Section 301 of the Labor-Management Relations Act.

(b)

The United States District Courts are not, after removal of an action from a State court in which an injunction was granted against a labor organization for breach of a no-strike clause, obligated to dissolve such injunction because of the Norris-LaGuardia Act.

American labor law should and must be uniform. At the present time a lack of uniformity exists with respect to injunctions in violation of a no-strike clause. This because state courts may grant an injunction and federal courts may not because of this Court's decision in **Sinclair Refining Company v. Atkinson**, supra.

The dissent in **Sinclair** recognized that state courts would become the forum for obtaining injunctions for violation of no-strike clauses.

Ultimately, state court injunctions were removed to the federal courts and the issue then was whether in a removed case the federal courts were required to dissolve such injunctions.

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[34] **Textile Workers v. Lincoln Mills**, 353 U. S. 448, 77 S. Ct. 912 (1957) at page 455.

In **Avco Corp. v. Aero Lodge 735, IAM,**[35] this Court reserved decision on such issue. Three members of this Court in a concurring opinion indicated that at a future date the Court would "have an opportunity to reconsider the scope and continuing validity of **Sinclair.**"

If federal labor law is to be uniform, then the rule with respect to the granting of injunctions in violation of a no-strike clause should be uniform in all classes of cases including those which are not removed from the state to federal courts.

Norris-LaGuardia was never intended as a limitation on the equitable jurisdiction of the state courts. It was designed to extend and only extends to the federal courts. Norris-LaGuardia applies only to "Courts of the United States."[36] Such courts are defined as "any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress."[37] It does not apply to state courts. To make it applicable to state courts, this Court will have to read such a finding into Section 301. This it cannot do.

If American labor law is to be uniform, the rule should be the same in the state and federal courts. This can best be accomplished by overturning **Sinclair.**

III

CONCLUSION

We submit that this Court should overrule **Sinclair Refining Company v. Atkinson,** supra, and hold that injunctions may be obtained in either federal or state courts

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[35] 390 U. S. 557, 88 S. Ct. 1235 (1968).

[36] 47 Stat. 70, 29 U. S. C. 101 et seq.

[37] 47 Stat. 73, 29 U. S. C. 113.

for violation of no-strike clauses of collective bargaining agreements. In so doing this Court will stabilize labor relations, cause arbitration to be a substitute for economic warfare, end wildcat strikes and give the parties to collective bargaining agreements the benefit of their bargain.

Respectfully submitted

HAROLD I. ELBERT
705 Olive Street
St. Louis, Missouri 63101
Attorney for Peabody Coal Company

Of Counsel:

SUSMAN, WILLER, RIMMEL & ELBERT
705 Olive Street
St. Louis, Missouri 63101

and

JOSEPH TOUHILL
301 North Memorial Drive
St. Louis, Missouri 63102

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IN THE

Supreme Court of the United States

1969

October Term, 1969
No. 768

THE BOYS MARKETS, INC.,

Petitioner,

vs.

RETAIL CLERKS UNION, LOCAL 770,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT.

KENNETH M. SCHWARTZ, ESQ.,
LAURENCE D. STEINSAPIR, ESQ.,
ROBERT M. DOHRMANN, ESQ.,
JOHN R. DACORSI, ESQ.,
Arnold, Smith & Schwartz,
6404 Wilshire Boulevard,
Suite 950,
Los Angeles, Calif. 90048,
(213) 653-6510,

Attorneys for Retail Clerks Union, Local 770, Respondent.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

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IN THE

Supreme Court of the United States

October Term, 1969
No. 768

THE BOYS MARKETS, INC.;

Petitioner,

vs.

RETAIL CLERKS UNION, LOCAL 770,

Respondent.

BRIEF FOR RESPONDENT.

I.
QUESTION PRESENTED.

The sole question presented in this case is whether the United States District Court has jurisdiction to enjoin a strike where that strike is in violation of a no-strike clause contained in a collective bargaining agreement.

II.
STATEMENT.

On February 19, 1969, the Petitioner (sometimes referred to as "Employer" herein) filed a complaint for injunctive relief and for specific performance of an agreement to arbitrate in the Superior Court of the State of California (App. 4). The complaint alleged that there existed between the parties a five (5) year

collective bargaining agreement covering the period April 1, 1964, through March 31, 1969, containing, among other covenants, a promise of the Respondent (sometimes referred to as "Union" herein) that it would not engaged in any strike, work stoppage or other concerted economic activity for the term of the agreement (App. 6). The complaint further alleged that on February 18, 1969, the Union members employed in the Employer's Store located in Cudahy, California, objecting to the assignment by the employer of certain work to non-union members, engaged in a strike and work stoppage and picketed the store with signs informing the public that the Union was "on strike" (App. 9).

On the next day, the Superior Court issued a temporary restraining order upon the Employer's request prohibiting striking, picketing or other forms of work stoppages pending a hearing on order to show cause to be held March 5, 1969 (App. 36).

On February 20, 1969, the Union filed its petition for removal with the District Court (App. 42). On February 25, 1969, the Union filed with the District Court a notice of motion for order quashing the temporary restraining order previously made by the State Court. Hearing on the motion was set for March 10, 1969, (App. 2).

On March 3, 1969, the Employer filed its motion and application for orders compelling arbitration and enjoining the conduct which had been enjoined by the State Court temporary restraining order (App. 2, 50). On March 10, 1969, a hearing was held on both motions. After argument, the District Court directed counsel for the Employer to prepare an order direct-

ing that arbitration proceed and granting injunctive relief pending arbitration. The order was filed and entered on March 13, 1969 (App. 2, 84).

The Union filed an answer on March 13, 1969 (App. 89) in which it denied the material allegations of the original complaint.

In granting injunctive relief, the District Court specifically enjoined and restrained the Union, pending the outcome of arbitration, from picketing or engaging in strikes or work stoppages or in inducing others to do so. The findings of fact and conclusions of law filed the same date (App. 74) recite that, based upon the Employer's complaint which was attached to the removal petition and upon the memoranda of points and authorities, irreparable injury would occur to the Employer unless the Union was restrained from engaging in such acts (App. 82). The Court concluded as a matter of law that the injunction "must be granted," (App. 83) and thereafter an appeal was taken.

The Court of Appeals for the Ninth Circuit on September 26, 1969, reversed, holding that this Court's decision in *Sinclair Refining Co. v. Atkinson,* 370 U.S. 195 (1962), was "nearly on all fours with the instant case," and that it was "bound by the holding of *Sinclair.*" (App. 98).[1] Reversing the judgment of the District Court, it quashed the injunction and remanded the case for further proceedings.

This Court granted *certiorari* on January 12, 1970.[2]

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[1]The opinion of the Court of Appeals is reported at 416 F. 2d 368.

[2].... U.S. ...., 90 Sup. Ct. 53.

III.

SUMMARY OF ARGUMENT.

In *Sinclair Refining Company v. Atkinson*,[3] this Court held that the Congress had rejected the argument that "injunctions against peaceful strikes are necessary to make the arbitration process effective." The Court properly determined that "whatever may be said for the argument, Congress has rejected it."[4]

The decision in *Sinclair* was based upon a factual situation which is indistinguishable from the present case.[5]

There exists no compelling reason for withdrawing from the *Sinclair* opinion. But even if there were, it would be for the Congress of the United States to enact the necessary measures and not for this Court to withdraw its earlier decision to that effect.

This Court cannot "accommodate" Section 4 of the Norris-LaGuardia Act with Section 301 of the Labor-Management Relations Act as the Petitioner requests without judicially repealing the former statute.

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[3]370 U.S. 195 (1962).

[4]*Id.* at 213.

[5]The Court of Appeals so held (Appendix, p. 98) and Petitioner concedes in its brief that the only distinguishable feature of the two cases is immaterial (Petitioner's Brief, p. 9).

IV.

ARGUMENT.

The opinion of this Court in *Sinclair v. Atkinson* was a proper interpretation of the applicable Federal labor laws and the principles of that decision should be reaffirmed in this case.

In *Sinclair* the Court was asked to compare the language of Section 4 of the Norris-LaGuardia Act[6] with the later enacted Section 301 of the Labor-Management Relations Act of 1947.[7] The former provides in relevant part that:

> "No Court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:
>
> (a) Ceasing or refusing to perform any work or to remain in any relation of employment;
>
> * * *
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;
>
> (f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;"

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[6] 47 Stat. 70, 29 U.S.C. §104.
[7] 61 Stat. 156, 29 U.S.C. §185.

The later statute merely extends the jurisdiction of the District Courts of the United States to actions involving violations of contract between employers and labor organizations "without respect to the amount in controversy or without regard to the citizenship of the parties."[8]

The Court, in *Sinclair*, was faced with the argument, again presented now, that the two Congressional enactments must be read "in harmony" one with the other and that the stringently prohibitory language of the earlier statute should be "accommodated" with Section 301 in order to once again vest in the District Courts the injunctive powers that they lost by reason of the 1932 anti-injunction legislation.

A. The Clear Language of Both Statutes Reveals That No Partial Repeal of Section 4 Was Intended Upon Passage of Section 301.

As the Court has emphasized before, statutory language is at least the foremost guide to the legislative intent if not conclusive of that intent[9] and in *Sinclair* this rule was employed. The Court construed the provisions of Section 4 of the Norris-LaGuardia Act as

> ". . . so broad and inclusive that [the Act] leaves not the slightest opening for reading in any exceptions beyond those clearly written into it by Congress itself. (Footnote Omitted) We cannot ignore the plain import of a Congressional enactment, particularly one which, as we have repeated-

[8] 29 U.S.C. §185(a).

[9] *United States v. American Trucking Associations*, 310 U.S. 534, 543 n. 18; *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 390-5; *United States v. Oregon*, 366 U.S. 643, 648.

ly said, was deliberately drafted in the broadest of terms in order to avoid the danger that it would be narrowed by judicial construction."[10] (Footnotes Omitted)

Turning to the language of Section 301 of the Labor-Management Relations Act itself, the Court commented that:

> "It is especially significant that the Section contains no language that could by any stretch of the imagination be interpreted to constitute an explicit repeal of the anti-injunction provisions of the Norris-LaGuardia Act in view of the fact that the Section does expressly repeal another provision of the Norris-LaGuardia Act dealing with union responsibility for the acts of agents. (Footnote Omitted) If Congress had intended that Section 301 suits should also not be subject to the anti-injunction provisions of the Norris-LaGuardia Act, it certainly seems likely that it would have made its intent known in this same express manner. . . . Thus, failure of Congress to include a provision in Section 301 expressly repealing the anti-injunction provisions of the Norris-LaGuardia Act must be evaluated in the context of a statutory pattern that indicates not only that Congress was completely familiar with those provisions but also that it regarded an express declaration of inapplicability as the normal and proper manner of repealing them in situations where such repeal seemed desirable."[11]

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[10] 370 U.S. at 202.

[11] *Id.* at 204.

The statutes here involved have remained unchanged in all particulars since the *Sinclair* decision and the argument remains as viable now as it was then. It has been the established law of the United States since the passage of the Norris-LaGuardia Act that the Courts of the United States may not enter injunctions in labor disputes. The later Congressional enactment, opening the doors of those courts to litigation for breaches of collective bargaining agreements without respect to the amount in controversy or to the citizenship of the parties, stopped well short of expanding the scope of relief that could be granted in such cases.[12]

B. The Legislative History of Section 301 Compels the Conclusion That Congress Never Intended to Tamper With the Established and Settled Principles Enunciated by the Norris-LaGuardia Act.

(1) Congress Considered the Very Point but Decided Against It.

Section 301(a) as enacted into law is almost identical to the original Senate Bill, S. 1126, as reported.[13]

[12]The Preamble of the Norris-LaGuardia Act ended with the following words: "therefore, the following definitions of, and *limitations upon*, the jurisdiction and authority of the Courts of the United States are enacted." (Emphasis Added) 47 Stat. 70, 29 U.S.C. §102. That the Congress did not intend, in 1947, to retreat from the limitations imposed by the earlier act is evident from the fact that sub-section (b) of Section 301 of the Labor-Management Relations Act makes specific reference to "any money judgment against a labor organization" 29 U.S.C. §185(b) and from the further fact that sub-section (e) of Section 301 is an express repealer of certain provisions of *another* section, Section 6, of the Norris-LaGuardia Act. 370 U.S. at p. 204 (n. 17).

[13]I Legislative History of the Labor-Management Relations Act 1947, 151.

No reference was made to Norris-LaGuardia at all in the original Senate Bill.

However, the House version of the same subject matter, H.R. 3020, appended to Section 302, subsection (e), which provided as follows:

> "(e) In actions and proceedings involving violations of agreements between an employer and a labor organization or other representative of employees, the provisions of the Act of March 23, 1932, entitled 'An Act to amend the Jurisdictional Code and to define and limit the jurisdiction of courts sitting in equity and for other purposes,' shall not have any application in respect of either party."[14]

Thereafter the Senate version survived a conference between committees of the House and the Senate with only slight modifications and H.R. 3020 as originally written did not. On June 3, 1947, Congressman Hartley submitted from the conference committee a report to accompany H.R. 3020 which explained the deletion of Section 302(e) of the original Bill in the following language:

> "Section 302(e) of the House Bill made the Norris-LaGuardia Act inapplicable in actions and proceedings involving violations of agreements between an employer and a labor organization. Only part of this provision is included in the conference agreement. Section 6 of the Norris-LaGuardia Act provides that no employer or labor organization participating or interested in a labor dispute shall

[14] *Id.* at 222.

be held responsible for the unlawful acts of their agents except upon clear proof of actual authorization of such acts, or ratification of such acts after actual knowledge thereof. This provision in the Norris-LaGuardia Act was made inapplicable under the House Bill. Section 301(e) of the conference agreement provides that for the purposes of Section 301 in determining whether any person is acting as an agent of another so as to make such other person responsible for his actions, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."[15]

There exists, therefore, the clear statement of one of the two sponsors of the Taft-Hartley Act, a member of the conference committee who joined in preparing the conference report[16] that, whereas the House sought repeal of two provisions of Norris-LaGuardia, only the one survived the conference and became law.[17]

As noted in the *Sinclair* decision the other sponsor of the Bill which also bears his name, Senator Taft, stated on the floor of the Senate that the conference committee had rejected repeal of Norris-LaGuardia.[18]

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[15] *Id.* at 570.

[16] *Id.* at 573.

[17] Such statements as found in the conference report prepared by a sponsor and member of the committee of conference are entitled to more weight than other evidences of legislative history. *U.S. v. United Mine Workers,* 330 U.S. 258, 278-280 (1947); *National Woodwork Manufacturers Association v. Labor Board,* 386 U.S. 612 (1967) 639-640.

[18] 370 U.S. at 208; II Leg. Hist. 1544.

The Senator's exact words were as follows:

> "The conferees rejected the broad prohibition of all kinds of strikes. They rejected the repeal of the Norris-LaGuardia Act. The provisions regarding injunctions are exactly those which were in the Senate Bill, and were approved by the Senate. *The only strikes which are declared to be illegal are secondary boycotts and jurisdictional strikes.* In such cases the injunction can be obtained only through the National Labor Relations Board and in that respect the House accepted entirely the provisions of the Senate Bill."[19]

(2) The Court Cannot, by the Indirection of "Accommodation," Vitiate the Statute That Congress Intended to Remain in Force.

The Court's opinion in *Sinclair* termed the word "accommodation" a "soft euphemism."[20]

Having demonstrated the clear intention of the Congress not to tamper with the anti-injunction provisions of Norris-LaGuardia, it is submitted that the present attack upon the *Sinclair* opinion is inappropriate and symptomatic of Petitioner's frustration with the Congress for its failure to respond to the invitation to act implicit in the *Sinclair* decision.[21]

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[19] II Leg. Hist. 1544 (Emphasis Added).

[20] 370 U.S. at 209.

[21] Since *Sinclair* the only bills submitted, S. 2132, 89th Cong., 1st Sess. (1965) and H.R. 9059, 89th Cong., 1st Sess. (1965) would have provided for the inapplicability of the Norris-LaGuardia Act to proceedings to enjoin the violation of, or to enforce, arbitral awards if the collective bargaining agreement of the parties both provided for submission to binding arbitra-

(This footnote is continued on the next page)

The argument that the *Sinclair* decision has created "disharmony" in the fabric of the Federal labor law is, of course, to say that the Congress has created such disharmony. For reasons set forth in this brief, *infra*, Respondent contends no discord between the statutes exists. However, and even if it did, all that this Court is empowered to do is to determine that any disparity must be left to legislative reconcilation.

> "To marshal these considerations is to suggest, not that there is no case for wise legislative action, but that there is no case for judicial reconsideration of *Sinclair*. The problem, if one exists, and the solution, if is desired, rests with Congress. Whether an injunction to restrain a strike over an arbitrable dispute should be part of the judicial arsenal in a Section 301 action, and the terms upon which it should be granted if available, are issues which engage competing considerations on both the intellectual and partisan level. *Sinclair* addressed these issues to Congress. It is no part of the judicial function to respond to a controversial claim of what the commonweal supposedly requires when Congress has chosen not to act."[22]

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tion and contained the express agreement of the parties that the Norris-LaGuardia Act should not apply. Since the failure of passage of these bills, courts have enforced arbitral orders and enjoined violations of them in *Philadelphia Marine Trade Assn. v. International Longshoremen's Association Local 1291*, 365 F. 2d 295; 368 F. 2d 932, reversed on other grounds, 389 U.S. 64 (1967) and *New Orleans SS Association v. General Longshoreworkers ILA*, 389 F. 2d 369 (6th Cir. 1968) *cert. denied*, 393 U.S. 828.

[22]Dunau, *Three Problems in Labor Arbitration*, 55 Va. L. Rev. 427, 468 (1969). The author of the article was counsel for the respondent union in *Avco Corp. v. Aero Lodge 735, IAM*, 390 U.S. 557 (1968) in which this Court held that actions for injunctive relief in labor disputes filed in State Courts are removable to the Federal Courts.

C. No Vital Consideration of the Federal Labor Policy Requires the Adoption of a Rule Contrary to Sinclair.

The Petitioner and the *amici* all deplore the serious and disruptive nature of strikes allegedly in violation of contract and suggest it is a severe labor problem on a National scale, yet the case here presented is only a minor incident in the context of the National labor policy.

In the present case petitioner operates thirty-five super markets in Southern California (App. 5) and suffered a work stoppage, according to its Complaint in the California Court, at one of those stores which lasted only until the following day, February 19, 1969, at which time it was restrained by the Los Angeles Superior Court (App. 8-9, 39). Even under petitioner's statement of the facts (denied in all material respects by respondent in its Answer filed in the United States District Court) petitioner would not have stated a claim (App. 11) sufficient for subject matter jurisdiction of the Court were it not for Section 301's suspension of that requirement in labor cases.[23]

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[23]29 U.S.C. §185(a). The Complaint in the present case, in alleging both that petitioner's agreement is with respondent and that respondent itself called, directed and oversaw the work stoppage (App. 5, 8-11) does not bring the case within the purview of the kind of work stoppage violative of collective bargaining agreements commonly referred to as "wild-cat strikes." However, it is submitted that cases arising in the State and Federal Courts under the facts presented here, and in *Sinclair* and *Avco v. Aero Lodge, supra,* note 22, will quite often present the circumstance of a wild-cat strike. The *Report of the Members Representing Labor Unions,* of the special Atkinson-Sin-

(This footnote is continued on the next page)

Here a few union members employed in one supermarket of a thirty-five store chain out of several thousand union members employed in supermarkets, drug stores and discount stores (App. 4-5) allegedly engaged in a work stoppage and picketed. The incident came close to the termination of a five-year collective bargaining agreement (App. 5, 8) at a time when some friction can be expected between the bargaining parties as the termination of the contract approaches. As Mr. Dunau's article observes:

> ". . . although there are no satisfactory statistics, it is probable that the overall incidence of strikes over disputes submissible to arbitration is quite small. In perspective the problem may be fairly minor. It is thus doubtful that relieving the vexation of the breach of contract strike in the individual case is worth the risk of even a limited intrusion of the strike injunction."[24]

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clair Committee of the American Bar Association Section of Labor Relations Law, 1963 Proceedings, recites:

> "Few of the strikes which are alleged to be in violation of contract are actually authorized strikes. They more commonly fall within the classification of 'wild-cat strikes.' Since wildcat strikes are neither sanctioned nor supported by the bargaining representative, it is difficult to see just how the right to injunctive relief in the Federal Courts, running against the individuals involved, can be of any material assistance in settling the dispute. The Court cannot require the original 'wild-catters' to return to work individually. To command the union to call off the strike or to urge the strikers to return to work is a mere surplusage, since, by definition, a wild-cat strike is unauthorized to begin with, and the union has attempted to meet its contractual obligations." (1963 Proceedings of the American Bar Association Section of Labor Relations Law, Special Atkinson-Sinclair Committee Part II, Pg. 233.

[24]Dunau, (*supra*) n. 22 at 465.

(1) There Is No "Inequality of Right" Inherent in the Sinclair Rule.

The argument is made by petitioner, by the *amici*, and by several writers[25] that the failure of the court to interpret the Congressional intent to be one of repeal in Section 301 or, failing that, the refusal of the court to "accommodate the two statutes" creates an inequitable situation in which the employers' right to insist upon enforcement of valid collective bargaining agreements has no effective remedy when it comes to work stoppages and strikes. The argument is incorrect. In fact, the overruling of *Sinclair* would itself result in inequity. Under present law the innocent party in a bargaining agreement breach, whether employer or union, may not enjoin the breach pending arbitration. Thus, if an employer wrongfully discharges a member of the union, the latter may not enjoin the discharge but rather must proceed to arbitration. If the union or its members without its sanction, cause a work stoppage, likewise the employer may not enjoin it but must proceed to arbitration. A similar result would obtain should the employer improperly subcontract bargaining unit work.

However, upon adopting the rule sought by petitioner, the Court will have effectively tipped the balance of collective bargaining obligations in favor of the employers and against the unions and their members. Then the employer could enjoin the union's breach but the union would not be free to exercise the same right

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[25]See *e.g.*, Cox, *Current Problems in the Law of Grievance Arbitration*, 30 Rocky Mt.L.Rev. 247 (1957) and *Aaron, Labor Injunctions in the State Courts*—Part II: A Critique, 39 Va. L. Rev. 1147 (1964).

and to seek the same remedy if the employer breached the contract.

"We doubt that our brethren on the management side would respond favorably to the suggestion by some neutral members that by such amendment to the Norris-LaGuardia [Act] the Federal District Courts will also be open to the unions for temporary injunctive relief to forestall certain management decisions pending resolution of their contractual validity by the arbitrator.

"Permitting the court to determine if there is a no-strike clause, if the grievance was arbitrable, and if the action taken is a strike, is permitting the court to *administer* the contract in exactly the same way it would be *administering* the contract if the union could obtain from the court a prior restraint on the employer's promoting, demoting, discharging, making seniority adjustments, assigning overtime, subcontracting, retiming jobs, making work assignments, etc."[26]

Mutuality of remedy, whether before the arbitrator or the courts is essential to the federally protected balance of collective bargaining. The restoration of injunctive powers to the District Courts will again place labor-management disputes primarily in the courts. Moreover, the decision of a Federal judge, without the hearing of evidence, in granting or refusing to grant an application for an injunction, will unfairly prejudice the non-prevailing party in the ensuing arbitration since its burden there will also consist of seeking, in

[26] 1963 Proceedings of the American Bar Association Section of Labor Relations Law, Special Atkinson-Sinclair Committee, Part II, p. 238.

effect, the arbitral overruling of the District Court, the very Court that may subsequently be requested to confirm, modify or vacate the award.[27]

Conceivably the injunctive proceeding will have served to undermine the arbitral process. In this context, the interpretation by the Court of the inter-relation of Section 301 of the Labor-Management Relations Act and Section 4 of the Norris-LaGuardia Act, announced in *Sinclair,* is entirely consistent with the Court's earlier decisions in *Textile Workers Union of America v. Lincoln Mills of Alabama*[28] and the *Steelworker "Trilogy of Cases."*[29]

Neither petitioner, nor the *amici*, nor the writers, put forward any satisfactory or compelling evidence that the strike in breach of a collective bargaining obligation is a major, or even a significant, disruption of the national federal labor policy. This Court may, therefore, conclude that the remedies already allowable to employers, the damages expressly referred to in Section 301[30] and the right to enforce all of the salient provisions of an arbitrator's award[31] are wholly adequate, and because of their adequacy there is no reason to take the drastic steps of overruling a prior decision of the court and judicially striking the provision of a viable statute of the United States under the guise of "re-interpretation" of the Congressional intent.

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[27] 9 U.S.C. §§ 9 through 11; 61 Stat. 669.

[28] 353 U.S. 448 (1957).

[29] *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564; *United Steelworkers of America v. Warrior and Gulf Nav. Co.*, 363 U.S. 574; and *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

[30] 29 U.S.C. §185(b).

[31] *Phila. Marine Trade Assn. v. Internat'l Longshoremen's Assn., supra,* 21.

D. 28 U.S.C. Section 1450 Does Not Dictate That a State Court Injunction Issued in a Labor Dispute Must Continue Until Modified or Dissolved by the Federal District Court.

Section 1450[32] deals with the attachment or sequestration of the goods or estate of a defendant. *Amicus Curiae* General Electric Company has cited language from Professor Moore's work, *Moore's Federal Practice* for the proposition that "all injunctions . . . had . . . prior to [the case's] removal shall remain in full force and effect until dissolved or modified by the District Court.[33] While Professor Moore recites this rule, he does so not in the context of labor law and strike injunctions, but in the framework of the status of attachment or sequestration upon removal from State to Federal Court.

This reliance on Professor Moore's treatise is misplaced and misleading. Moore does discuss the problem of a Section 301 removal action not, however, in the context as cited by the *Amicus*. Recognizing the critical distinction between equity jurisdiction—from which authority is derived the dispensation of certain forms of equitable relief, including injunctions—and original jurisdiction—the power to entertain the claim, Moore recites:

> ". . . any Section 301 type of action brought in the state court can be removed and proceeded with, since the suit is based on a federal cause

[32] 62 Stat. 940, 28 U.S.C. §1450.

[33] 1A *Moore's Federal Practice*, Para. 0.168(4.-5) 2d Ed. 1965.

of action, *unless injunctive relief of such a nature is involved that the federal courts lack jurisdiction because of the Norris-LaGuardia Act.*"[34] (Emphasis added).

Moore does not advocate that the State Court injunction continues to be effective until modified or dissolved as contended by the *Amicus*. He recognizes the limitations imposed upon the Federal equitable jurisdiction because of the Norris-LaGuardia Act. His position as to the status of the State Court injunction after removal is, at best, unclear.

This interpretation of Moore's treatise is consistent with recent Federal Court decisions. In *General Electric Co. v. Local Union 191,* 413 F. 2d 964 (5th Cir. 1969), the Court of Appeals dissolved a State Court injunction under similar circumstances, holding:

"We are of the view that the District Court did not err in dissolving the injunction, not because either *Sinclair, supra,* or *Avco, supra,* explicitly dictates that result, but because, in our view, once this case was removed, *a failure to dissolve the State Court injunction would have been tantamount to issuance of that same injunction by the Federal District Court which, as we have just noted, would be proscribed by the Norris-LaGuardia Act under the Sinclair decision.*"[35] (Emphasis added).

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[34] *Id.* at page 1009.

[35] Accord, *Day-Brite Lighting Division v. IBEW,* 303 F. Supp. 1086 (D.C. Miss. 1969), wherein the court held:

"Federal jurisdiction being present, this court is required to dissolve the ex parte state court injunction which issues in a labor dispute affecting interstate commerce. Section 4 of the Norris-LaGuardia Act so requires."

Labor injunctions are governed by Norris-LaGuardia. For this reason, to accept the argument that State Court injunctions remain in effect until dissolved or modified by the Federal Court requires the conclusion that Federal Courts may enforce injunctions they could not have initially issued. If Norris-LaGuardia deprives the Federal Court of equitable power to issue such injunction, it should prevent the State Court injunction from assuming the elevated status of a valid Federal Court order. Otherwise, the Federal Court will be able to do indirectly what it cannot do directly.[86] Upon removal, the State Court order is void. This conclusion would be most consistent with the desired result of a uniform national labor law. As suggested by one writer:[87]

> "even if removal itself does not render the state court injunction void and it remains temporarily in effect, the federal court which could not have issued it and should not be able to enforce it, 'has no alternative but to dissolve' it upon appropriate motion by the union."

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[86]See Bartosic, *Injunctions and Section 301: The Patchwork of Avco and Philadelphia Marine on the Fabric of National Labor Policy*, 69 Col. L. Rev. 980 (1969). The author cites *Ex Parte Fisk*, 113 U.S. 713 (1885) in which the defendant failed to comply with a State Court order requiring out-of-court testimony pursuant to a New York statute. After removal the defendant persisted in his refusal to testify. The Federal Court cited him for contempt. The Supreme Court reversed in a *Habeas corpus* proceeding, holding:

> "When . . . a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void."

[87]*Id.* at 995.

E. Decisions Under the Railway Labor Act and the Anti-Trust Laws Are Inapposite to This Case.

(1) The Railway Labor Act.

The argument that, because the Railway Labor Act was considered with the Norris-LaGuardia Act,[88] Section 301 of the Labor-Management Relations Act should also be considered with the Norris-LaGuardia Act is not supported by case law. This Court has clearly held that:

> "The relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as those which form the basis of the National Labor Relations Act, 49 Stat. 449, as amended, 29 U.S.C. 151, *et seq.* It is one of those differences which underlies the controversy in this case."[89]

The Brotherhood contended that the Norris-LaGuardia Act should apply in railroad labor cases in the same manner as it applies to other cases. In distinguishing the accommodation made between the Railroad Labor and Norris-LaGuardia Acts, the Court held:

> "The Brotherhood has cited several cases in which it has been held that the Norris-LaGuardia Act's ban on Federal injunctions is not lifted because the conduct of the Union is unlawful under some other statute. We believe that these are in-

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[88] *Brotherhood of Railway Trainmen v. Chicago River & Indiana Railway Co.*, 353 U.S. 302 (1957).

[89] *Id.* at p. 30, 31 n. 2, See also Note, *Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-La Guardia*, 70 Yale L. J. 70 (1960); 72 Harv. L. Rev. 354 (1958).

apposite to this case. None involved the need to accommodate the statutes, when both were adopted as part of a pattern of labor legislation."[40]

Because of the clear language quoted above, respondent submits that petitioner asks the Court not only to overrule its decision in *Sinclair*, but also the quoted portions of the *Chicago River* case as well.

(2) The Anti-Trust Laws.

Petitioner has placed reliance upon *United States v. Hutcheson*[41] in which the Court spoke of the Norris-LaGuardia Act, and the Sherman and Clayton Anti-Trust Acts as "interlacing."[42]

Respondent submits that *Hutcheson* is of no assistance to petitioner's argument in this case—the "interlacing" or "harmonizing" to be accomplished here consisting of no longer giving effect to a part of Norris-LaGuardia—because the Court in *Hutcheson* expressly held that Norris-LaGuardia overrode the two anti-trust enactments and insulated labor conduct "from the taint of being a 'violation of any law of the United States', including the Sherman law."[43]

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[40] 353 U.S. 30, 42.

[41] 312 U.S. 219 (1941).

[42] *Id.* at 231.

[43] 312 U.S. at 236. Justice Frankfurter remarked:

> "Congress in the Norris-LaGuardia Act has expressed the public policy of the United States and defined its conception of a 'labor dispute' in terms that no longer leave room for doubt. *Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940). This was done, as we recently said, in order to 'obviate the results of the judicial construction' theretofore given the Clayton Act. *New Negro Alliance v. Grocery Co.*, 303 U.S. 552, 562." (312 U.S. at 234).

V.

CONCLUSION.

For the foregoing reasons respondent respectfully requests that the judgment of the Court of Appeals for the Ninth Circuit be affirmed.

Dated: March 25, 1970.

Respectfully submitted,

KENNETH M. SCHWARTZ,
LAURENCE D. STEINSAPIR,
ROBERT M. DOHRMANN,
JOHN R. DACORSI,
Arnold, Smith & Schwartz,
Attorneys for Retail Clerks Union, Local 770.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 768

THE BOYS MARKETS, INC., *Petitioner,*

v.

RETAIL CLERKS UNION, LOCAL 770

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus* in support of the position of Retail Clerks Union Local 770 is filed, with the consent of the parties, as provided for in Rule 42(2) of this Court, by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federaion of 121 national and international unions having a total membership of approximately thirteen and one-half million working men and women.

SUMMARY OF ARGUMENT

1. In *Sinclair* v. *Atkinson,* 370 U.S. 195,203 (1962), this Court held that in enacting §301 of the Labor Management Relations Act Congress specifically faced the question of whether the Norris-LaGuardia Act's ban on injunctive relief against breach of contract strikes should be repealed

and, "that §301 was not intended to have any such partially repealing effect upon such a long-standing, carefully thought out and highly significant part of this country's labor legislation."

All the arguments which could be summoned in opposition to the majority's conclusion are stated in the *Sinclair* dissent. There has not been a single legislative or judicial development since 1962 which would justify a reassessment of this Court's determination as to what the legislative judgment on the proper role of Norris-LaGuardia had been in 1947.

As the majority opinion makes clear, *Sinclair* is not an expression of this Court's policy judgments; it is, instead, an expression of judicial deference to the legislature in an area where the latter is preeminent. The regulation of the economic weapons of management and labor, like economic regulation generally, has an inherent potential for doctrinal instability because this area is characterized by "strong contending forces and deeply held views." *Local 1976 Carpenters* v. *National Labor Relations Board*, 357 U.S. 93, 99 (1958). And these forces constantly seek to protect their self-interest with the weapon at hand. Thus, should this Court indicate that it is willing to change that which has been deemed to have been settled by Congress, the result will be to increase the resources utilized to win lost legislative battles in the courts.

In light of the above, every relevant consideration militates in favor of following the doctrine of *stare decisis* in the instant case.

2. Assuming, *arguendo*, that *stare decisis* does not control and that the issue presented here is to be viewed as *res nova*, the conclusion still follows that *Sinclair* should be reaffirmed.

We start from the position that the fundamentals of Norris-LaGuardia and the federal law of labor arbitration are basically consistent. The premise of both is that the judiciary is unsuited to the task of setting the basic substantive rules which govern the conduct of the parties to a labor dispute, and that the public interest is best served by the utilization of methods of dispute settlement other than litigation. Enactment of Norris-LaGuardia constituted "clear disapproval of [the] free wheeling judicial exercises" which had characterized the era which was brought to a close in 1932. *Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 382 (1969). And the federal law of labor arbitration is based on the recognition that the courts should not administer collective agreements, and that §203(d) calls for judicial action which to the maximum extent feasible simply remits the parties to the arbitral process, *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960).

At the practical level, too, Norris-LaGuardia's ban on injunctive relief conforms with the way arbitration works. Under almost all collective agreements, the employer is free to act in the first instance—to administer the agreement in accordance with his views as to its meaning. There is, therefore, no lack of parity in the present situation. Norris-LaGuardia prevents either party from obtaining a judicial order requiring the other to conduct itself in accordance with the substantive provisions of the agreement; it permits either party to obtain against the other a judicial order requiring the use of the agreed-upon method of adjudicating whether actions that have been taken are in violation of the agreement, see, *Clure* v. *Publishers Assn. of N.Y.*, 314 F. 2d 343 (C.A. 2nd Cir., 1963), *affirming per curiam*, 214 F. Supp. 520 (U.S.D.C. S.D.N.Y., 1963).

3. As its form demonstrates, Norris-LaGuardia was not simply a repudiation of the substance of the general labor

law evolved by the courts, it was also a condemnation of a particular procedural device—the injunction. In enacting Norris-LaGuardia "Congress was intent upon taking the federal courts out of the labor injunctions business," *Marine Cooks* v. *Panama S.S. Co.* 362 U.S. 365, 369 (1960).

The temporary restraining order and the preliminary injunction are inherently inappropriate methods for deciding labor disputes. Their disrepute is not the product of a particular era:

> "Despite the numerous and extensive procedural reforms introduced by the Norris-LaGuardia Act and its counterparts in a number of states, it remains a fact that the labor injunction, by its very nature, is a form of judicial power peculiarly subject to abuse." Aaron, *Labor Injunctions In the State Courts—Part II: A Critique,* 50 Va. L. Rev. 1147, 1156 (1964).

Strikes do not come neatly labeled as breach of contract strike over an underlying matter which is subject to arbitration and which after balancing the equities should be enjoined. There are four dimensions to the problem of when, and what type, of an injunction should be issued.

First, in light of the language of the collective agreement and applicable public law, is there a breach of the no-strike clause? See, e.g., *Mastro Plastics Corp.* v. *National Labor Relation Board,* 350 U.S. 270 (1956); *Drake Bakeries* v. *Local 50 Bakery Workers,* 370 U.S. 254, 266 (1962).

Second, is the underlying dispute arbitrable? One-third of the employees working under major collective bargaining agreements are covered by clauses which leave one or more dispute issues non-arbitrable. The exact limits of what has been made subject to, and what has been specifically excluded from arbitration, is highly ambiguous.

Third, under *Locomotive Engineers* v. *M.K.T. R.R. Co.,* 363 U.S. 528, 531-532 (1960), it is now settled that in hearing

an application for an injunction against a breach of contract strike, the district court, in order "to ensure that extraordinary equitable remedies will not become the engines of injustice [is] free to exercise the typical powers of a court of equity."

Finally, if the union in question has fully met its responsibilities and the strike is a true "wildcat" the district court becomes the agency which requires individual employees to work against their will. The utility of this role is questionable and damage it would have on the prestige of the courts is plain to anyone who remembers the effects of "government by injunction."

Thus, "authorizing strike injunctions in breach of contract suits would raise again the danger of unfairness in the hasty adjudication of temporary injunction cases." Winter, *Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia,* 70 Yale L.J. 70, 99 (1960).

4. The basic theme of employers seeking to overrule *Sinclair* is that "an injunction is the only effective means of enforcing a no-strike clause." (Pet. Br. 15). The efficacy of the traditional remedies, damage and self-help, left open by *Sinclair,* is far more substantial than employers choose to acknowledge, see, e.g., *W. L. Mead, Inc.* v. *Teamsters,* 129 F. Supp. 313 (U.S.D.C. Mass., 1955), *affirmed* 230 F.2d 576 (C.A. 1st Cir., 1956) (employer awarded $359,000 as damages for strike over an arbitrable dispute). And these traditional remedies are not the sole means of protection open to management. While the employer in this case rushed into court for an injunction, other employers have secured a contractual remedy which is equally effective, but does not conflict with the policy of §203(d). They have obtained agreements providing for "quickie" arbitration procedures, see, *New Orleans Steamship Assn.* v. *ILA Local 1417,*

389 F.2d 369, 370 (C.A. 5th Cir., 1968), *cert. denied* 393 U.S. 828.

Enforcement of an award ordering an end to a work stoppage is consistent with the institutional interests of the courts protected by Norris-LaGuardia and by the federal law of labor arbitration, as it has been developed thus far:

> "The arbitrator has already determined that the strike is in breach of contract. Adjudication of the meaning of the no-strike promise and non-compliance with it has taken place. No independent substantive interpretation of the agreement is required of the court. All that is left for the court is to decide whether the strike which the award has ordered ended has been stopped." Dunau, *Three Problems in Labor Arbitration*, 55 Va. L. Rev. 427, 475 (1969).

Moreover, as the Courts of Appeals which have faced the question have recognized, see *New Orleans Steamship Assn.*, this form of relief is compatible not only with the policy considerations marshaled by the dissenters in *Sinclair*, but also with the majority opinion in *Sinclair*.

The burden of the argument to overrule *Sinclair* has been that injunctive relief against breach of contract strikes is necessary to preserve the integrity of arbitration. This argument overlooks the protean vitality of the arbitral process. That process has evolved a remedy which protects every relevant employer interest, and which fosters rather than disserves the policies of both Norris-LaGuardia and the LMRA. Section 203 (d) expresses the judgment that final methods of dispute settlement agreed upon by the parties are preferable to court litigation. The development of "quickie" arbitration confirms the wisdom of trusting to the capacity of the parties to labor agreements to solve their own problems. It also confirms the wisdom of the devotion to Congressional intent demonstrated by this Court in *Sinclair*.

ARGUMENT

SINCLAIR REFINING CO. v. *ATKINSON*, *370 U.S. 195 (1962)*, SHOULD BE REAFFIRMED

The question presented in the instant case is whether in light of §4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. 101 *et seq.*, and §§203 (d) and 301 of the Labor Management Relations Act, 61 Stat. 136, 29 U.S.C. 151 *et seq.*, the federal district courts are empowered to enjoin breach of contract strikes at the behest of an employer.

Three basic answers have been offered to this question:

The first is that the status of Norris-LaGuardia's ban on injunctive relief against peaceful strikes and picketing was a critical issue in the debates on the LMRA, that these debates demonstrate that it was generally recognized in Congress that this prohibition was to remain in full force and effect unless specifically repealed, see, Winter, *Labor Injunctions and Judge Made Labor Law: The Contemporary Role of Norris-LaGuardia*, 70 Yale L.J. 70, 94-100 (1960); compare §§10(h), 10(j), 10(l) and 206, that it was also recognized by Congress that Norris-LaGuardia prohibited injunctions against breach of contract strikes, Winter, 70 Yale L.J. at 96, that §301 contains no explicit relaxation of Norris-LaGuardia, that the legislative history of §301 demonstrates that Congress squarely considered and rejected making Norris-LaGuardia inapplicable in §301 actions, and that it is therefore beyond the power of the courts to fashion an injunctive remedy against breach of contract strikes. This, of course, is the answer this Court, by a 5-3 vote, gave in deciding *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962).

The second answer is that the purpose of §301 was to enhance the remedies available for breaches of collective agreements, that the refusal to enjoin breach of contract strikes works to narrow employer remedies, and that the

proper approach is therefore to read §301 as rendering Norris-LaGuardia inapplicable where a breach of contract strike is alleged whether or not the underlying dispute is arbitrable. This is the answer offered by management when this problem was first before this Court, and it is the answer that was unanimously rejected in *Teamsters Local 795* v. *Yellow Transit Freight Lines*, 370 U.S. 711 (1962), see also, *Sinclair*, 370 U.S. at 224-225 (dissenting opinion):

> "[T]here is no general federal anti-strike policy; and although a suit may be brought under §301 against strikes which, while they are breaches of private contracts, do not threaten any additional public policy, in such cases the anti-injunction policy of Norris-LaGuardia should prevail."

The third answer is that §§203(d) and 301 stress the effective enforcement of arbitration agreements, that a strike over an arbitrable matter may threaten the smooth functioning of the arbitration machinery, and that the terms of the LMRA and its legislative history do not preclude an "accommodation" between Norris-LaGuardia and the LMRA which permits injunctions against breach of contract strikes where the underlying dispute is arbitrable. This is the position taken by the dissenters in *Sinclair* and rejected by the majority.

1. The arguments and counterarguments relating to the position taken in *Sinclair* have been effectively exhausted. The Court's holding in *Sinclair*, 370 U.S. at 203, 205-206, 209-210, is simple and straightforward:

> "[T]he Norris-LaGuardia Act deprives the courts of the United States of jurisdiction to enter [the] injunction [sought] unless, as is contended here, the scope of that Act has been so narrowed by the subsequent enactment of §301 of the Taft-Hartley Act that it no longer prohibits even the injunctions specifically described in §4 where such injunctions are sought as a remedy for breach of a collective bargaining agreement. Upon consideration, we cannot agree with that

view and agree instead with the view expressed by the courts below and supported by the Courts of Appeals for the First and Second Circuits that §301 was not intended to have any such partially repealing effect upon such a long-standing, carefully thought out and highly significant part of this country's labor legislation as the Norris-LaGuardia Act."

* * * *

"The failure of Congress to include a provision in §301 expressly repealing the anti-injunction provisions of the Norris-LaGuardia Act must be evaluated in the context of a statutory pattern that indicates not only that Congress was completely familiar with those provisions but also that it regarded an express declaration of inapplicability as the normal and proper manner of repealing them in situations where such repeal seemed desirable. . . . [Moreover] the legislative history of §301 shows that Congress actually considered the advisability of repealing the Norris-LaGuardia Act insofar as suits based upon breach of collective bargaining agreements are concerned and deliberately chose not to do so."

* * * *

"We think that the idea that §301 sanctions piecemeal judicial repeal of the Norris-LaGuardia Act requires acceptance of a wholly unrealistic view of the manner in which Congress handles its business. The question of whether existing statutes should be continued in force or repealed is, under our system of government, one which is wholly within the domain of Congress. When the repeal of a highly significant law is urged upon that body and that repeal is rejected after careful consideration and discussion, the normal expectation is that courts will be faithful to their trust and abide by that decision."

All arguments which could be summoned in opposition to this reasoning are stated in the dissent. The briefs of the Petitioner and the amici supporting reversal fail to develop a single argument or cite a single piece of legislative history that was not fully considered in 1962. Their briefs are a naked appeal for a reassessment of this Court's

determination as to what the legislative judgment had been in 1947. And this appeal is made without pointing to any development in the interim which would justify such a reassessment.

This Court's decision focused attention on the question of injunctive relief for breach of contract strikes and was an open invitation to legislative action. While neither the Petitioner nor the amici supporting reversal mention the point, the business community, which has ample resources to press its case in Congress, has in fact sought a legislative determination that this Court erred in *Sinclair*. As a result, a number of Bills have been introduced in Congress, see, e.g., S. 2132, 89th Cong., 1st Sess. (1965), and H.R. 9059, 89th Cong., 1st Sess. (1965). But Congress has refused to act. To us this alone should be decisive:

> "[B]ecause of the symbolic importance of the strike injunction in the politically sensitive area of labor-management relations, and because the strike injunction has been once explicitly rejected by the political process, . . . any change in its status should be made explicitly by Congress and the President. . . . The Court [has an obligation] to keep clear the channels of policy making and the lines of responsibility in a democratic society. This obligation can be fulfilled only if the judicial institutions confine their functions so as not to blur the distinction between interstitial lawmaking and dealing with the gristle of the body politic. Certain issues should be faced squarely by legislatures, and rules of statutory interpretation are, among other things, instruments for inducing such confrontation and instruments for the protection of the people from the courts and the courts from the people." Wellington and Albert, *Statutory Interpretation And The Political Process: A Comment On Sinclair* v. *Atkinson*, 72 Yale L.J. 1547, 1566 (1963).

By 1962 the major authorities as to both Norris-LaGuardia and the federal labor arbitration policy had been rendered. There have been no subsequent decisions of this Court which have changed the legal situation as it was

understood at that time. The Chamber of Commerce's argument (Br. 3-6) to the contrary, citing the ruling in *Avco Corp.* v. *Local 735 Machinists*, 390 U.S. 557 (1968), which allows removal of state court suits for labor injunctions, as one which has changed the context of this problem, is without merit. The dissent in *Sinclair* raised the question or removal and argued it fully, see 370 U.S. at 227. Thus *Sinclair* was decided with full appreciation of this ramification of the result reached.

Finally, while there are no statistics on the number of breach of contract strikes, the statistics on the total number of work stoppages during the term of a contract prior and subsequent to *Sinclair* have remained remarkably stable, compare, U.S. Dept. of Labor Bulletin No. 1339, *Analysis of Work Stoppages 1961*, Table 16 (Stoppages during the term of a contract accounted for 10.8% of the man-days idle because of strikes) with U.S. Dept. of Labor Bulletin No. 1646, *Analysis of Work Stoppages 1968*, Table 17 (Stoppages during the term of a contract accounted for 9.1% of the man-days idle). Thus, *Sinclair* has not precipitated a problem of unanticipated proportions, indeed there is nothing to indicate that it has had any deleterious effect at all.

In light of the above, the initial question here is simply whether *stare decisis* should govern.

Questions of statutory interpretaion form a continuum from situations involving the application of a generalized legal command to specific acts in the absence of any legislative history directly in point, see, e.g., *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963), *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300 (1965), to those in which the Court after a full study of the relevant materials comes to the conclusion that Congress has focused on the exact problem and directed that it be resolved in a particular fashion. *Sinclair* is, of course, a paradigm of the latter.

The force of *stare decisis* is least compelling in the first class of cases. The ultimate justification for their authority is the soundness of their reasoning in light of the overall statutory policy being pursued. And it is recognized that the courts have a continuing obligation to perfect the law in light of new arguments, new decisions in other fields, and the experience gained under a particular decision.

Sinclair is not an expression of this Court's policy judgments in an area left open by Congress. It is an expression of judicial deference to the legislature in an area where the latter is preeminent, and an acknowledgement that any other course would be judicial usurpation, compare, *Edwards* v. *Pacific Fruit Express*, 390 U.S. 538 (1968), *Steel Workers* v. *Bouligny*, 382 U.S. 153 (1967). A reversal of such a decision does not have the principled justification that is available in the first class of cases noted above and it places a severe strain on relations between the legislature and the judiciary. Thus it is at this end of the continuum that the claims of *stare decisis* are most forceful.

The argument for *stare decisis* here is strengthened by the fact that the regulation of the economic weapons of management and labor, like economic regulation generally, has an inherent potential for doctrinal instability. These areas are characterized by "strong contending forces and deeply held views" *Local 1976 Carpenters* v. *National Labor Relations Board*, 357 U.S. 93, 99 (1958). These forces constantly seek to protect their self-interest with the weapons at hand. They are organized to take maximum advantage of the openings that are offered to them. If this Court follows a policy of adhering to decisions based on congressional intent, the thrust of the parties efforts will be directed toward legislative action and toward raising new issues and theories for judicial consideration. Thus such a course results in channeling the inherent dynamism of those interested in economic regulation in directions that

are consistent with the sound development of the law and with the institutional interests of the courts.

Naturally, once this Court indicates that it is willing to change that which has been deemed to have been settled by Congress, the parties, sensing the nature of their opportunity, will intensify the pressure for such changes in a variety of areas. The result will be to increase the resources being utilized to win lost legislative battles in the courts at the expense of legislative activity and of litigation designed to stimulate judicial innovations addressed to problems left open by Congress.

This Court has consistently maintained a heavy labor law docket, yet so far as we have been able to ascertain, there have been only three square reversals of prior precedents dealing with labor relations since 1950: *Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 348 U.S. 437 (1955), overruled in *Smith* v. *Evening News*, 371 U.S. 195 (1962); *Montgomery Trades Council* v. *Ledbetter Erection Co.*, 344 U.S. 178 (1952), overruled in *Local 438 Laborers* v. *Curry*, 371 U.S. 542 (1963); *International Union UAW* v. *Wisconsin Employment Relations Board*, 336 U.S. 245 (1947), overruled in *San Diego Trades Council* v. *Garmon*, 359 U.S. 236 (1959). And in each instance the overruling decision was simply the culmination of a series of intervening judicial developments. *Sinclair* should not be a fourth addition to this list.

2. Assuming that *stare decisis* does not control and that the issue presented here is to be viewed as *res nova*, the conclusion still follows that *Sinclair* should be reaffirmed. The essential legislative points are fully developed in *Sinclair*, see, pp. 8-9, *supra*, and, while we rely heavily upon them, we will concentrate on the argument that the dissent rather than the majority opinion is faithful to the overall design of federal labor policy.

We start from the position that the fundamentals of Norris-LaGuardia and the federal law of labor arbitration are basically consistent. The premise of both is that the judiciary is unsuited to the task of setting the basic substantive rules which govern the conduct of the parties to a labor dispute, and that the public interest is best served by the utilization of methods of dispute settlement other than litigation.

Enactment of Norris-LaGuardia constituted "clear disapproval of [the] free wheeling judicial exercises" which produced a "'general' labor law . . . based on self-mesmerized views of economic and social theory . . . and on statutory misconstruction" *Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 382-383 (1969), and its basic purpose was to limit the role of the judiciary by establishing a "'government hands off' philosophy of labor relations," Wellington & Albert, 72 Yale L.J. at 1555, see, 75 Cong. Rec. 4915 (Remarks of Sen. Wagner). This was considered necessary because a:

> "loss of [judicial] prestige [is] the unavoidable result of judicial interference in labor disputes, for such intervention leads to the assumption of partisan positions. While courts making law in areas such as tort or contract may draw upon generally accepted values, there are few such shared principles in the field of labor relations. Every decision tends to be a political statement favoring one camp or the other." Winter, 70 Yale L.J. at 75, compare, *Marine Cooks* v. *Panama S.S. Co.*, 362 U.S. 365, 370 n. 7 (1960).

Similarly, the basic element of federal labor arbitration law is the recognition that the courts are not well suited to the task of administering collective agreements: *Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574, 578, 580-582 (1960).

> "The collective bargaining agreement states the rights and duties of the parties. It is more than a con-

tract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. . . . It is an effort to erect a system of industrial self-government. . . . Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, 'a compilation of diverse provisions; some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and some do little more than leave problems to future consideration with an expression of hope and good faith.' . . . [T]he grievance machinery under a collective bargaining agreement is [thus] at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the various needs and desires of the parties."

* * * *

"The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. . . . The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in her personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed."

For this reason this Court has been astute in avoiding efforts to draw the judiciary into deciding the merits of arbitrable disputes. It has recognized that effectuation of the policy of §§203(d) and 301 calls for judicial action which to the maximum extent feasible simply remits the parties to the private tribunal they have set up for dispute settlement.

Thus, in *Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 566 (1960), the Court rejected the theory of *Machinists* v. *Cutler-Hammer*, 271 App. Div. 917, aff'd 297 N.Y. 519, which required the courts to determine whether the "meaning of the provision of the contract sought to be arbitrated is beyond dispute" before ordering arbitration on the ground that "it could only have a crippling effect on grievance arbitration." And in *Steelworkers* v. *Enterprise Wheel and Car Corp.*, 363 U.S. 593, 596 (1960), it added:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. . . . The arbitrators under these collective agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level—disputes that require for their solution knowledge of the custom and pracices of a particular factory or of a particular industry as reflected in particular agreements."
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> "It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."

At the practical level, too, Norris-LaGuardia's ban on injunctive relief conforms to the way arbitration works. The argument that because *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 455-458 (1957), holds that Norris-LaGuardia does not forbid an order to compel arbitration, equality requires that it be held to authorize the injunction of strikes over arbitrable disputes, is without merit. Its underlying fallacy is the failure to recognize that an order to arbitrate is directed toward an adjudication after the event and does not restrain the employer from acting in violation of the agreement.

Under almost all collective agreements the employer is free to act in the first instance—to administer the agreement in accordance with his views as to its meaning. The order to arbitrate does not enjoin him from so doing. It only requires that he submit to an agreed-upon form of adjudication, after the fact, as to whether his actions violated the agreement. The comparable order against a union, alleged to have violated the agreement by striking, can only be an order directing it to arbitrate, not an injunctive order preventing it from taking the action which is alleged to be in violation of the agreement, see, *Publishers Ass'n. of N.Y.* v. *New York Mailers Union,* 314 F. 2d 624, 625 (C.A. 2nd Cir., 1963) *vacated on another issue* 376 U.S. 714; compare, *Sinclair,* 370 U.S. at 214.

There is, therefore, no lack of parity in the present situation. Norris-LaGuardia prevents either party from obtaining a judicial order requiring the other to conduct itself in accordance with the substantive provisions of the agreement; it permits either party to obtain against the other a judicial order requiring the use of the agreed-upon method of adjudicating whether actions that have been taken are in violation of the agreement, see, *Clure* v. *Publishers Assn. of N.Y.,* 314 F. 2d 343 (C.A. 2nd Cir., 1963), *affirming per curiam,* 214 F. Supp. 520 (U.S.D.C. S.D.N.Y., 1963).

The preclusion of injunctive relief is a prime safeguard of the integrity of the arbitration process. To permit a court to issue preliminary injunctive relief is to short circuit the arbitration procedure by allowing the court to administer the contract. It is the majority opinion and not the dissent in *Sinclair* which is faithful to *Lincoln Mills* and the *Steelworkers Trilogy.* The no-strike clause is not unique. There are contract breaches by employers which give rise to claims of irreparable injury to unions or employees that are at least as compelling as that made by the employer here. Given the particular concern of §4 of Norris-LaGuardia for the integrity of the strike, to allow injunctions against union

breaches of a no-strike clause while withholding the availability of prior restraints on the employer's promoting, demoting, discharging, making seniority adjustments, assigning overtime, subcontracting, retiming jobs, making work assignments, etc., in breach of his contractual obligations is to reverse the statutory scheme. Thus, while adoption of the *Sinclair* dissent's "accommodation" theory would be in the name of protecting arbitration, its result would undermine the essential working postulate of the system, which is that compulsion against either party from an outside source should come after rather than prior to adjudication on the merits.

3. As its form demonstrates, Norris-LaGuardia was not simply a repudiation of the substance of the general labor law evolved by the courts, it was also a condemnation of a particular procedural device—the injunction. In enacting Norris-LaGuardia "Congress was intent upon taking the federal courts out of the labor injunctions business," *Marine Cooks*, 362 U.S. at 369.

The premise of those who favor giving the district courts power to enjoin breach of contract strikes is that the pre-Norris-LaGuardia experience is a historical irrelevance because of the judiciary's increased sophistication in labor matters and because of the restraints placed on the court's decision making process by the terms of the collective agreement. These premises cannot withstand scrutiny.

The temporary restraining order and the preliminary injunction are inherently inappropriate methods for deciding labor disputes. Their disrepute is not the product of a particular era. As Prof. Aaron has noted, Aaron, *Labor Injunctions in the State Courts—Part II: A Critique*, 50 Va. L. Rev. 1147, 1156-1158 (1964).

> "Despite the numerous and extensive procedural reforms introduced by the Norris-LaGuardia Act and its counterparts in a number of states, it remains a

fact that the labor injunction, by its very nature, is a form of judicial power peculiarly subject to abuse. An injunction is ordinarily issued on the assumption that someone is committing an unlawful act which threatens irreparable harm to someone else, and for which there is no adequate remedy at law. If those were indeed the facts in every case the only arguments left to the opponents of the injunction would be those against the morality or legality of the statute or public policy which declared the actions enjoined to be unlawful—arguments which I eschew. But the facts of a typical labor dispute which reaches the litigation stage are usually tangled and unruly; as any arbitrator knows the conflicting statements and allegations of the parties in complicated cases must be carefully sifted and evaluated before one can be reasonably certain of arriving at even an approximation of the truth. Indeed, it often happens that after the most exhaustive exploration of a complex dispute, the arbitrator still entertains substantial doubts that he is in possession of all the relevant facts. In his effort to get at them, however, he is aided by a more informal procedure than that which prevails in the courtroom, and he can often pursue indirect lines of inquiry which past experience, or the offhand remarks or behavior of witnesses, indicate may prove fruitful. The arbitrator's proper concern, as Dean Harry Shulman used to say, is not that he may hear too much that is irrelevant, but that he may not hear enough that is relevant."

"Consider the sharply contrasting position of a trial judge hearing an application for a temporary restraining order. Frequently, as we have seen, he will entertain the application in an ex parte proceeding, possibly on the basis of affidavits and argument, without testimony. It is safe to assume that in most instances he will have only slight familiarity, if any, with industrial relations practice; and frequently, he will have only meager knowledge of labor law. Add to these disadvantages a crowded docket prompting a perfectly natural desire to get rid of the case, and it becomes apparent that there is little chance that the judge will probe deeply enough beneath the plaintiff's allegations and the defendant's answers and become sufficiently

well informed about the case to reach a reasonable judgment concerning the need for a restraining order."

"If the case should subsequently go to a hearing on a motion for a preliminary injunction, the judge will take testimony, but the hearing will be subject to all the other handicaps mentioned above. In addition, though the rules of evidence will, perhaps, prevent the court from hearing much that is irrelevant, they will also practically always assure that he will not hear enough that is relevant."

"There is also another factor to consider. The study of injunctions in Los Angeles County showed a strong tendency on the part of judges who had granted temporary restraining orders not only to refuse modifications of such orders, but also to grant subsequent motions for preliminary injunctions in the same cases. This suggests that judges, like the rest of us, are not receptive to suggestions that they may have acted precipitously or incorrectly and should publicly confess error by reversing themselves."

"It seems more than likely, therefore, that many temporary restraining orders and premilinary injunctions are improperly issued, not because the judge is prejudiced, but because he is insufficiently informed. Sometimes the result is inconsequential to either party; in the case of certain deep-seated disputes, the judicial restraint of some outward manifestations of protest may intensify the conflict and delay the ultimate solution, but it will not destroy the defendant's position. In a great many, if not the majority, of cases, however, the restraining order or preliminary injunction spells defeat for the defendant's cause. Every objective study of injunctions in action since publication of the pioneer work by Frankfurter and Greene has noted this result. Such a result is wrong, not because we can be sure that the defendant's cause is just and its objectives lawful—they frequently are not—but because the judicial power has been used prematurely and unfairly to aid one party to a private dispute."

Strikes do not come neatly labeled as breach of contract strike over an underlying matter which is subject to arbitra-

tion and which after balancing the equities should be enjoined. There are four dimensions to the problem of when, and what type, of an injunction should be issued.

First, is there a breach of the no-strike clause? Initially, there are limitations imposed by public law. A strike in response to certain unfair labor practices is protected activity under *Mastro Plastics Corp.* v. *National Labor Relations Board,* 350 U.S. 270 (1956). In any given case to ascertain whether unfair labor practices occurred and whether they meet the *Mastro Plastics* standard is likely to be a complex undertaking. A work stoppage over abnormally dangerous conditions is not a strike, §502, see, *National Labor Relations Board* v. *Knight Morley Corp.,* 251 F. 2d 753 (C.A. 6th Cir., 1957), *cert. denied,* 357 U.S. 928 (1958). The determination of what is an abnormally dangerous condition is, of course, a subtle and difficult one.

In addition, many no-strike provisions contain exceptions or limitations, express or implied. "Despite the widespread prevalence of grievance and arbitration procedures and no-strike pledges, a strike not constituting a violation of the letter of the agreement is possible in about half of all major agreements," U.S. Dept. of Labor Bulletin No. 1425-6, *Major Collective Bargaining Agreements, Arbitration Procedures,* 91 (1966). Because of the complex nature of collective agreements, see pp. 14-15, *supra,* it is by no means easy to determine the limits of these exceptions, even when they are explicitly spelled out, see, *Ormet Corp.* v. *Steelworkers,* 72 LRRM 2268 (U.S.D.C. W.D. Pa., 1969), *injunction suspended pending appeal,* 72 LRRM 2510 (C.A. 3rd Cir., 1969). The problems are even more difficult if the contention is that the overall context demonstrates that the action in question was not a breach. For example, in *Drake Bakeries* v. *Local 50 Bakery Workers,* 370 U.S. 254, 266 (1962), the union argued that a refusal to work overtime was not an illegal work stoppage because the agreement did not impose a duty to do so. Thus in that case the mean-

ing of the no-strike pledge turned on the ultimate meaning of the contract.

Moreover, there are a variety of interpretative problems that do not fit any neat category. In *A. H. Bull S. S. Co.* v. *Seafarers,* 250 F. 2d 326 (C.A. 2nd Cir., 1957), there was a controversy as to whether the no-strike clause applied after the union properly reopened the contract to renegotiate certain wage rates. This case is particularly instructive because the granting of an injunction would have cut directly into the union's power to strike over the wage rates. The employer, obviously, had considerable incentive to obtain an injunction which would paralyze the use of economic power on this issue in the guise of enjoining a breach of contract. "The truth is that authorizing the issuance of a temporary injunction, as is frequently true of temporary injunctions in labor disputes, may effectively dispose of [the union's] rights and render entirely illusory the right to review" *Curry,* 371 U.S. at 550. And there are of course a variety of additional problems that could be cited at length, compare, Dunau, *Three Problems In Labor Arbitration,* 55 Va. L. Rev. 427, 465-467 (1969).

Second, assuming that the district court finds that the no-strike provision is applicable, the next question which must be faced is whether the underlying dispute is arbitrable. In cases in which there is an "all disputes" clause, this determination should not prove troublesome under the standards of the *Steelworkers Trilogy.* But one-third of the employees working under major collective bargaining agreements are not covered by such clauses:

> "A total of 348 agreements, covering 2.2 million workers, [out of a total 1,717 agreements covering 7.5 million workers] identified one or more dispute issues as nonarbitrable. The reasons for such exclusions usually were not indicated by the agreements and, although they may have been fully understood by the parties, they are not always clear to outsiders reading

> the agreements. Some exclusions undoubtedly were intended to preserve certain management prerogatives, others to preserve union prerogatives . . . underlying many exclusions was a strongly held belief of one or both parties that the issue in question was too important or too subtle to be entrusted to a decision of a third party." U.S. Dept. of Labor, Bulletin No. 1425-6, at 11.

We have appended the relevant language of three major agreements—General Motors-UAW, General Electric-IUE, and Alcoa-Steelworkers—to give the Court a cross-section of this type of clause In each instance, the exact limits of what has been made subject to, and what has been specifically excluded from, arbitration remains ambiguous. This ambiguity is enhanced by the fact that these categories are not watertight; a dispute that generates enough feeling to bring about the threat of a walkout will often have a number of components and each party will emphasize the aspect of the total controversy that furthers its position. This is illustrated by the jockeying for position between the Ormet Corp. and the Steelworkers in the dispute which led to the *Ormet* case, 72 LRRM 2268. The letters setting forth the parties' positions in that case are set out as Appendix B hereto.

Third, if the district court finds that there is a breach of contract strike over an arbitrable matter, its task is not finished. Under *Locomotive Engineers* v. *M.K.T.R.R. Co.*, 363 U.S. 528, 531-532 (1960) it is now settled that in hearing an application for an injunction against such a strike the district court in order "to ensure that extraordinary equitable remedies will not become the engines of injustice" is

> "free to exercise the typical powers of a court of equity, it has the power to impose conditions requiring maintenance of the status quo. Conditions of this nature traditionally may be made the price of relief when

> the injunctive powers of the court are invoked and the conditions are necessary to do justice between the parties. 'The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff. . . . [The court] will avoid . . . injury so far as may be, by attaching conditions to the award. . . .' Yakus v. United States, 321 U.S. 414, 440."

Finally, the no-strike clause is a code of conduct for both the union as an institution, and for the individual employees it governs, *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 246 (1962). To implicate the union in the breach it is necessary to show that it initiated, authorized or condoned the work stoppage in some way, see, e.g., *Metro East Journal*, 66-3 ARB ¶8855 (1966). If the union has met its obligations the order to return to work must run against the individual employees. The district court, rather than the employer thus becomes the agency which requires employees to work against their will. The utility of such a role is questionable, Dunau, 55 Va. L. Rev. at 465, and the damage that it would have on the prestige of the courts is plain to anyone who remembers the effects of "government by injunction." That propelling the courts into the settlement of wildcat strikes can exacerbate the underlying controversy is illustrated by what transpired in *National Airlines* v. IAM, 416 F.2d 998, 1002 (C.A. 5th Cir., 1969).

The short of it, as Prof. Winter has stated, 70 Yale L.J. at 99 is that:

> "Authorizing strike injunctions in breach of contract suits would raise again the danger of unfairness in the hasty adjudication of temporary injunction cases. While contract law presents a more precise standard than the old common law of labor, doctrines created under section 301, arising out of the labor-management struggle and colored by it, are likely to lack the precision of principles derived from commercial contract law. The Supreme Court has recently held that the

> common law of labor agreements cannot always be based upon traditional notions of contract. Even direct application of commercial precedents to the loosely-drawn, frequently ambiguous collective agreements will present problems not amenable to hasty decision."

Moreover, there is nothing to demonstrate that the district courts are significantly more sophisticated about labor disputes today than they were in 1932, see p. 14 *supra*. The few post-*Sinclair* to have reached this Court do nothing to set unease at rest. In the instant case, the trial court acted as though *Sinclair* did not exist. Its action certainly is at odds with the argument that the district courts can be relied on for their discretion and self restraint. The performance of the district court in *ILA* v. *Philadelphia Marine Trade Assn.*, 389 U.S. 64, 74, 76 (1967), was equally distressing:

> "On its face, the [District Court's] decree appears merely to enforce an arbitrator's award. But that award contains only an abstract conclusion of law, not an operative command capable of 'enforcement.' When counsel for the union noted this difficulty and sought to ascertain the District Court's meaning, he received no response. Even at the contempt hearing on March 1, the union was not told how it had failed to 'comply with and . . . abide by the [Arbitrator's] Award,' in accordance with the District Court's original order."
>
> * * * *
>
> "The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. . . . We do not deal here with a violation of a court order by one who fully understands its meaning but chooses to ignore its mandate. We deal instead with acts alleged to violate a decree that can only be described as unintelligible. The most fundamental postulates of our legal order forbid the imposition of a penalty for disobeying a command that defies comprehension."

And in *Avco* an *ex parte* injunction issued upon the filing of the complaint with no notice or opportunity to be heard

extended to the defendants. The allegations of the complaint were accepted at face value, despite no supporting showing other than a conclusory verification by the affiant that "he has read the foregoing bill, and that the allegations thereof are true except those made on information and belief, and these he believes to be true." Also accepted on faith was the complaint's representation that "Each and every alleged grievance above described should have been handled under the grievance procedure outlined in the collective bargaining agreement, and each suspension of work was in violation thereof." The *ex parte* injunction that issued ran not only to the Union and its agents, but to all members as well, and it ran to them not only when acting in concert, but also when acting individually. The injunction was not limited to a suspension of work over matters submissible to the grievance and arbitration procedure. Nor was the injunction limited to a suspension of work, but extended to "any interruption of operations," and any interference with the "normal conduct" of business for the duration of the agreement, see Record in No. 445 Oct. Term, 1967, 8-10. Accordingly, the consequence of the injunction there, had it been affirmed would have been that for the duration of the agreement its administration would be overhung by an omnipresent judicial decree with two thousand workers citable for contempt for its alleged violation.

4. The basic theme of employers seeking to overrule *Sinclair* is that "an injunction is the only effective means of enforcing a no-strike clause" (Pet. Br. 15). The truth of this assertion is far from self-evident. Despite Prof. Cox's sage advice *(id.* at 15n. 11), employers do sue for damages and they do collect, see, e.g., *W. L. Mead, Inc.* v. *Teamsters,* 129 F. Supp. 313 (U.S.D.C. Mass., 1955), *affirmed* 230 F.2d 576 (C.A. 1st Cir., 1956) (Employer awarded $359,000 as damages for strike over an arbitrable dispute). "Unions are as little enchanted as any other institutions by the risk of a damage judgment which may empty or deplete

their treasuries," Dunau, 55 Va. L. Rev. at 465. Thus as Senator Taft correctly stated in connection with §303, damage suits are "a powerful deterrent," 2 Legislative History of the Labor Management Relations Act, 1365. And while employers claim that their disciplinary powers are ineffective in briefs attempting to overrule *Sinclair* (Chamber of Commerce Br. 14), they take a different view when they counsel each other as to the proper course to follow in contract negotiations. In that context they state:

> "Disciplining individual strikers is one of the most effective methods of preventing future contract breaches by a wildcat strike. Fortunately, most arbitrators have not seen fit to dilute the no-strike pledge when confronted with breaches thereof; plainly considered, an employee's engagement in a wildcat strike is considered to be a most serious act of misconduct." Edwards and Bergmann, *The Legal and Practical Remedies Available to Employers to Enforce a Contractual "No-Strike" Commitment*, 21 Labor L.J. 3, 5 (1970).

Thus the efficacy of the traditional remedies, damages and self-help, left open by *Sinclair* is far more substantial than employers choose to acknowledge. And these traditional remedies are not the sole means of protection open to management. While the employer in this case rushed into court for an injunction, other employers have secured a contractual remedy which is equally effective, see, Edwards and Bergman, Labor L.J. at 4, 14-15, but does not conflict with the policy of §203(d). They have obtained agreements providing for "quickie" arbitration procedures. For example, the contract in *New Orleans Steamship Assn.* v. *ILA Local 1417*, 389 F. 2d 369, 370 (C.A. 5th Cir., 1968), *cert. denied* 393 U.S. 828, provided as follows:

> "The parts of the agreement which are involved in this dispute are a no strike clause, an arbitration clause, and a clause empowering the arbitrator to issue a desist order. They provide in pertinent part:

(a) *No Strikes—No Lockouts*

"There shall be no strikes, work stoppages, nor shall there be any lockouts.

(b) *Disputes Procedure and Arbitration*

"The parties accept the principle that any dispute involving the interpretation or application of the terms of this agreement shall be resolved in an orderly and expeditious manner. They commit themselves to the procedure outlined below. Failure by either party to staff and maintain the permanent disputes committee provided for herein and failure to deal with disputes under the disputes procedure shall constitute a violation of this agreement.

• • • •

(d) Either party to a dispute may by-pass the procedure leading up to arbitration and obtain arbitration forthwith whenever a violation of sections (a) and/or (b) of this Article shall be alleged. In this event, a notice of such allegation shall be made by telegram to the other party and to the arbitrator. The arbitrator shall hold a prompt hearing within seventy-two (72) hours after receipt of the notice and shall render an award within twelve (12) hours after the hearing. In such case, the arbitrator shall make findings of fact concerning the alleged violation and shall prescribe appropriate relief, including an order to desist therefrom.

The arbitrator in this matter served by virtue of his inclusion on a panel of six permanent arbitrators selected by the parties to serve for the duration of the agreement. On October 5, 1965 appellant notified the arbitrator that appellees had engaged in work stoppages and requested a hearing within 72 hours as provided in the agreement, Article XVIII, § (d), supra. A four day hearing was held commencing on October 8, 1965. The award was entered on December 13, 1965. The arbitrator found that stoppages had occurred in violation of the contract and sustained appellant's grievance. He directed appellees, their officers, agents, representatives and members to "• • • cease and

desist from work stoppages in violation of their contract * * *"

The sole criticism employers level at "quickie" arbitration is that "it is somewhat less convenient than the traditional approach of obtaining ex parte orders directly from courts," Edwards and Bergman, 21 Labor L.J. at 15. Since it is datum that: "The restraining order and preliminary injunction involved in labor disputes reveal the most crucial points of legal maladjustment. The temporary injunctive relief without notice, or, if upon notice relying upon dubious affidavits, serves the important function of staying defendant's conduct regardless of the ultimate of justification of such restraint." Frankfurter and Green, The Labor Injunction, 200 (1930), this seems a small price to pay.

Enforcement of an award ordering an end to a work stoppage is consistent with the institutional interests of the courts protected by Norris-LaGuardia and by the federal law of labor arbitration, as it has been developed thus far:

> "The arbitrator has already determined that the strike is in breach of contract. Adjudication of the meaning of the no-strike promise and non-compliance with it has taken place. No independent substantive interpretation of the agreement is required of the court. All that is left for the court is to decide whether the strike which the award has ordered ended has been stopped. If it has not been stopped, and if the award is within the arbitrator's power and free of serious prejudicial procedural irregularity, the injunction would order that the strike end. If the defense interposed is that the strike in progress is a different one from that which the award terminates, the court must decide that question. If the court finds that it is the same strike, the strike injunction would issue; if the court finds that it is a different strike—one to attain an end other than that covered by the arbitrator's ruling—no injunction would issue. The latter case would present a new matter for initial determination by the arbitrator." Dunau, 55 Va. L. Rev. at 475.

Finally, as the Court of Appeals which have faced the question have recognized, see, *New Orleans Steamship Assn.*, 389 F.2d 369; *Philadelphia Marine Trade Assn.*, 368 F.2d 932, this form of relief is compatible not only with the policy consideration marshaled by the dissenters in *Sinclair* but also with the majority opinion in *Sinclair:*

> "The end product of an arbitration proceeding is a determinative award. While Congress might better have relied solely on voluntary compliance, LMRA section 301 has left that alternative behind. Section 301's minimum meaning in placing sanctions behind a collective bargaining agreement is exaction of obedience to an award. An award ordering a strike to end and rendered in accordance with an agreement authorizing its issuance is in precise keeping with the parties' own means of ordering their relationship. Such an agreement expresses the parties' decision that termination of the stoppage in compliance with the arbitrator's order is the proper way to assure performance of the no-strike promise. They have chosen not to rely on good faith, or on discharge or discipline of breach-of-contract strikers, or on damage suits. They want obligatory specific performance. Their particular promise can therefore only be given effect by a strike injunction compelling compliance with the cessation-of-strike award. In this situation, LMRA section 301 would be a dead letter were it not to include a strike injunction as the sanction to enforce the disobeyed award. To bar the strike injunction because of section 4(a) of the Norris-LaGuardia Act would *pro tanto* nullify LMRA section 301." Dunau, 55 Va. L. Rev. at 474.

There is, of course, little chance that the ameliorative effects of "quickie" arbitration will be realized if *Sinclair* is reversed. Employers know that "the courts have rendered [the labor injunction] a potent weapon" when given the chance, Wellington and Albert, 72 Yale L.J. at 1553. Just as history has conditioned the labor movement to be wary

of the courts, it has conditioned employees to embrace litigation as a preferred method of settling disputes. It is only the impetus of *Sinclair* that has brought management toward even a limited acknowledgment of the policy of §203(d) and of *Lincoln Mills* and the *Steelworkers Trilogy*:

> "Until recently many employers' counsels have refused to agree to grievance and arbitration clauses which gave the company, as well as the union, a right to raise a grievance for a breach of contract. The reason for this has been the requirement that a party to a collective agreement must first exhaust his contract remedies before seeking court redress. Thus, under contracts permitting filing of grievances by a company, the union could insist upon the company first exhausting the grievance procedure before resorting to legal action.
>
> "However, since the Supreme Court's decision in *Avco Corporation* v. *Aero Lodge No. 735, IAM*, employers have found advantage in being able to file and process a grievance under the so-called 'quickie arbitration' procedure, in order to secure an arbitrator's cease and desist order against a wildcat strike." Edwards and Bergman, 21 Labor L.J. at 4.

The burden of the argument to overrule *Sinclair* has been that injunctive relief against breach of contract strikes is necessary to preserve the integrity of arbitration. This argument overlooks the protean vitality of the arbitral process. That process has evolved a remedy which protects every relevant legitimate employer interest, and which fosters rather than disserves the policies of both Norris-LaGuardia and *Lincoln Mills*. Section 203(d) expresses the judgment that final methods of dispute settlement agreed upon by the parties are preferable to court litigation. The development of "quickie" arbitration confirms the wisdom of trusting to the capacity of the parties to labor agreements to solve their own problems. It also confirms the

wisdom of the devotion to Congressional intent demonstrated by this Court in *Sinclair*.[1]

CONCLUSION

For the foregoing reasons, as well as those stated by Retail Clerks Union Local 770, the decision below should be affirmed.

Respectfully submitted,

J. ALBERT WOLL
General Counsel, AFL-CIO
ROBERT C. MAYER
LAURENCE GOLD

736 Bowen Building
815 Fifteenth Street, N.W.
Washington, D.C. 20005

THOMAS E. HARRIS
Associate General Counsel, AFL-CIO

815 Sixteenth Street, N.W.
Washington, D.C. 20006

April, 1970

[1] The District Court not only issued its own injunction it refused to quash the State Court injunction obtained before removal. Thus this case presents the question left open in *Avco*. It seems plain that a reaffirmance of *Sinclair* leads to the conclusion that Norris-LaGuardia requires the Federal Courts to quash a State Court labor injunction; any other result would be a "juridicial absurdity," Dunau, 55 Va. L. Rev. at 472. Indeed the strength of this point is such that the Petitioner does not even argue the contrary, and the Chamber of Commerce (Br. 6 n. 4) all but concedes it.

APPENDIX A

I. The Alcoa—Steelworkers Agreement

ARTICLE XV. ARBITRATION

Section 46. Scope

Not all grievances are subject to arbitration. The scope of arbitration and the jurisdiction of the Board of Arbitration are defined in Section 51.

Grievances may be submitted to arbitration by either party after the grievance procedure has been exhausted subject to the following principles and procedure:

• • • •

Section 51. Jurisdiction of Board

A. The Board shall regard the provisions of this Agreement as the basic principles and fundamental law governing the relationship of the parties. The Board's function is to interpret the provisions of the Agreement and to decide cases of alleged violation of such provisions. The Board shall not supplement, enlarge, diminish, or alter the scope or meaning of the Agreement as it exists from time to time, or any provisions therein nor entertain jurisdiction of any subject matter not covered thereby (except to the extent necessary to determine its jurisdiction). Without limiting the foregoing, the subjects of wages (including incentives), production standards, and contracting out are by this Section excluded from arbitration, except that wage rates are arbitrable for new or changed job classifications under Article IV of this Agreement, and except that questions of compliance with Article III (Continuation of Wage Rates) are arbitrable.

B. Whenever the Board may determine that the subject of a dispute is, or a decision or award thereon would be, beyond the Board's jurisdiction, or would contravene this Section 51, it shall dispose of the case by reducing such determination to writing and may then refer the dispute to the parties.

C. The Board shall not take jurisdiction of any dispute or grievance arising under any prior agreements.

II. The General Motors—UAW Agreement

Powers of the Umpire

(46) It shall be the function of the Umpire, after due investigation and within thirty days after submission of the case to him, to make a decision in all claims of discrimination for Union activity or membership and in all cases of alleged violation of the terms of the following sections of this Agreement and written local or national supplementary agreements on these same subjects: Recognition; Representation; Grievance Procedure; Seniority; Disciplinary Layoffs and Discharges; Call-In Pay; Working Hours; Leaves of Absence; Union Bulletin Boards; Establishment of New Plants; Strikes, Stoppages and Lockouts; Wages, except Paragraph (97); General Provisions; Apprentices; Skilled Trades; Vacation Pay Allowances; Holiday Pay; Paragraphs (79) through (79f), relative to procedures on Production Standards; Paragraph (79h); and of any alleged violations of written local or national wage agreements. The Umpire shall have no power to add to or subtract from or modify any of the terms of this Agreement or any agreements made supplementary hereto; nor to establish or change any wage; nor to rule on any dispute arising under Paragraphs (78) through (78d), (79g) or (79i) regarding Production Standards. The Umpire shall have no power to rule on any issue or dispute arising under The Waiver Section or the Pension Plan, Insurance Program and Supplemental Unemployment Benefit Plan Section, except with respect only to the question of whether a discharged employe should receive a supplemental allowance pursuant to Section 8 of Article II of the Pension Plan (Exhibit A-1). Any case appealed to the Umpire on which he has no power to rule shall be referred back to the parties without decision.

III. The General-Electric-IUE Agreement

XV—Arbitration—1. Any grievance which remains unsettled after having been fully processed pursuant to the provisions of Article XIII, and which involves either,

(a) the interpretation or application of a provision of this Agreement, or

(b) a disciplinary penalty (including discharge) imposed on or after the effective date of this Agreement, which is alleged to have been imposed without just cause,

may be submitted to arbitration upon written request of either the Union or the Company, provided such request is made within 60 days after the final decision of the Company has been given to the Union pursuant to Article XIII, Section 2(c). For the purpose of proceedings within the scope of (b) above, the standard to be applied by an arbitrator to cases involving disciplinary penalties (including discharge) is that such penalties shall be imposed only for just cause.

2. (a) A request for arbitration shall state in reasonable detail the nature of the dispute and the remedy requested. A copy of the request shall be sent to the American Arbitration Association.

(b) Within 30 days after receipt of a request to arbitrate the receiving party will give its response thereto in writing, with a copy to the Association, stating whether or not it believes the stated dispute to be arbitrable. If the receiving party believes the dispute not to be arbitrable, it will state its reasons in reasonable detail.

(c) If the response agrees to the arbitrability of the dispute, the Association will proceed to process the request in accordance with Section 3.

(d) If a response to a request for arbitration disagrees as to arbitrability of the dispute, either party may request a conference to discuss the arbitrability of the dispute, and to seek to resolve the differences between the parties.

3. (a) When a request for arbitration involves only relief from a disciplinary penalty or discharge alleged to have been imposed without just cause, or involves a dispute which the Company admits to be arbitrable, or when a final court judgment shall have ordered arbitration of a request, the Association shall submit the appropriate matter promptly to one of the Contract Arbitrators listed below for scheduling of a hearing thereon.

• • • •

4. (a) In the event the receiving party has asserted that the dispute contained in a request for arbitration is not arbitrable, the Association shall have authority to process the request for arbitration and appoint an arbitrator in accordance with the procedure set forth in Section 3 above only after a final judgment of a Court has determined that the grievance upon which arbitration has been requested raises arbitrable issues and has directed arbitration of such issues. The foregoing part of this Section shall not be applicable if the request for arbitration involves only relief from a disciplinary penalty or discharge alleged to have been imposed without just cause.

(b) In the consideration and decision of any question involving arbitrability (including any application to a court for an order directing arbitration), it is the specific agreement of the parties that:

(i) Some types of grievance disputes which may arise during the term of this Agreement shall be subject to arbitration as a matter of right, enforceable in court, at the demand of either party. (See Section 6 below.)

(ii) Other types of disputes shall be subject only to voluntary arbitration, i.e., can be arbitrated only if both parties agree in writing, in the case of each dispute, to do so. (See Section 7 below.)

(iii) This Agreement sets out expressly all the restrictions and obligations assumed by the respective parties,

and no implied restrictions or obligations inhere in this Agreement or were assumed by the parties in entering into this Agreement.

(iv) In the consideration of whether a matter is subject to arbitration as a matter of right, a fundamental principle shall be that the Company retains all its rights to manage the business, including (but not limited to) the right to determine the methods and means by which its operations are to be carried on, to direct the work force and to conduct its operations in a safe and effective manner, subject only to the express limitations set forth in this National Agreement, Local Seniority Supplements executed under the provisions of Article XI thereof, and Local Understandings executed in accordance with Sections 3 of Article XXI thereof; and it is understood that the parties have not agreed to arbitrate demands which challenge action taken by the Company in the exercise of any such rights, except where such challenge is based upon a violation of any such express limitations (other than those set out in Section 7 below).

(v) No matter will be considered arbitrable unless it is found that the parties clearly agreed that the subject involved would be arbitrable in light of the principles of arbitrability set forth in this Article and no court or arbitrator shall or may proceed under any presumption that a request to arbitrate is arbitrable.

(c) If a final judgment of a court has determined that a request raises arbitrable issues, the court's decision shall specify in reasonable detail the issues as to which arbitration is directed. The arbitration shall thereafter proceed only upon the issues specified in such final court judgment and the arbitrator shall have no authority or jurisdiction to consider issues other than those specified.

6. (a) Arbitration as a matter of right includes only requests to arbitrate which involve:

(i) Disciplinary action (including discharge) but with

certain exceptions spelled out in this Article:

(ii) The claimed violation of a specific provision or provisions of the National Agreement (with the limitations and exceptions set out in this Article);

(iii) The claimed violation of a provision or provisions of a signed Local Seniority Supplement entered into in accordance with Article XI, Section 2 of this National Agreement or of a provision or provisions of a Local Understanding entered into in accordance with Article XXI, Section 3 of this National Agreement.

(b) A request for arbitration, in order to be subject to arbitration as a matter of right under the provisions of subsection (a) (ii) and (a) (iii) above, must allege a direct violation of the express purpose of the contractual provision in question, rather than of an indirect or implied purpose. For example, a request which claims incorrect application of the method of computing overtime pay under the provisions of Section 2 of Article V would be arbitrable as a matter of right, whereas a request which questioned the right of the Company to require the performance of reasonable overtime work, on the claimed ground that Article V contains an implied limitation of that right, would be subject only to voluntary arbitration. A request that Article XI and the appropriate Local Seniority Supplement had been violated by the layoff of a senior employee in reference to a junior employee would be arbitrable as a matter of right but a request that subcontracting of work in the plant while bargaining unit employees are on layoff violated a claimed implied limitation of Article XI and the applicable Local Seniority Supplement would be subject only to voluntary arbitration.

7. All requests for arbitration which are not subject to arbitration as a matter of right under the provisions of Section 6 above, are subject only to voluntary arbitration. In particular, it is specifically agreed that arbitration re-

quests shall be subject only to voluntary arbitration, by mutual agreement, if they

(a) Involve the existence or alleged violation of any agreement other than those described in 6(a) above.

(b) Involve issues which were discussed at national level negotiations, but which are not expressly covered in this National Agreement (e.g., subcontracting).

(c) Involve claims that an allegedly implied or assumed obligation of this National Agreement has been violated.

(d) Involve claims that Article I, or Section 3 of Article IV of this National Agreement has been violated.

(e) Would require an arbitrator to consider, rule on or decide the appropriate hourly, salary or incentive rate at which an employee shall be paid, or the method (day, salary or incentive) by which his pay shall be determined. (See footnote.)

(f) Would require an arbitrator to consider, rule on or decide any of the following:

(i) The elements of an employee's job assignment;

(ii) The level, title or other designation of an employee's job classification;

(iii) The right of management to assign or reassign work or elements of work. (See footnote.)

(g) Would require an arbitrator to determine the method or data to be used by the Company in setting an incentive price or standard. (See footnote.)

(h) Involve claims of violation of Sections 1 and 2 of

Footnote: Subsections e, f, and g above reflect the fact that this National Agreement does not set out specific rates or classifications for jobs, and are designed to confirm the intent of Article VI, Section 1 and Article VI, Section 5 (first sentence) that disputes over individual job classifications, rates of pay, incentive standards, etc., are assigned by the parties to local negotiations, and not to arbitration.

Article XI, in locations in which a Local Seniority Supplement has not been signed in accordance with Section 2 of Article XI.

(i) Pertain in any way to the establishment, administration, interpretation or application of Insurance, Pension or Savings Plans, or other Benefit plans in which employees covered by this Agreement are eligible to participate;

(j) Involve discipline or discharge imposed on employees having less than six months of continuous service with the Company, provided that if by Local Understanding a period of less than six months has been agreed upon as the probationary period for new employees, and such Local Understanding is applicable to the particular employee involved, such agreed upon shorter period of time shall be substituted for "six months" in the foregoing; and provided further that nothing in this subsection shall limit the authority of an arbitrator with respect to disciplinary penalties or discharges imposed in violation of Section 1 of Article IV.

(k) Pertain in any way to Article XXII of this Agreement or its interpretation or application.

(l) Pertain in any way to the provisions of any local agreement covering a retraining program under the provisons of Article XXIV hereof, or the interpretation or application thereof.

8. In any case which involves discipline (including discharge) effected on the ground that an employee has refused, orally or otherwise, to perform an assigned task, either party may, at any time before the arbitration hearing is closed, request that the arbitrator decide the matter without an opinion, in which event the arbitrator must simply determine and announce an award without stating any grounds or reasons for his decision. If an award is issued by an arbitrator in any such case, it shall be final and binding on the parties, but, to the extent that the arbitrator's

opinion in support of his award interprets or applies any provision of the 1966 GE-IUE National Agreement, such opinion shall not be considered binding upon the parties, and shall not constitute a precedent for the purpose of interpreting or applying that provision of the Agreement in the future.

APPENDIX B

July 30, 1969

Mr. Homer E. Bussa, Director
District No. 23
United Steelworkers of America
412 Central Union Building
Market & 14th Streets
Wheeling, West Virginia 26003

Dear Mr. Bussa:

Your letter of July 24, 1969, addressed to the President of Ormet Corporation, has been referred to me for reply.

This is to advise you that Grievances No. 1419 and No. 1459 raise issues involving the interpretation and application of the collective bargaining Agreement between our Company and your Union; and, accordingly, are arbitrable under the terms of the collective bargaining Agreement.

In particular, Grievance No. 1419 involves the interpretation and application of Article III, Paragraph "B," and Article XVIII of the Agreement. Grievance No. 1459 involves the question as to whether subcontracting made necessary by a refusal of employees to perform work assignments comes within the scope of Article XXX and whether, irrespective of this, the Company in any way violated Article XXX.

Since Grievances No. 1419 and No. 1459 present arbitrable disputes; and, in view of the failure of the Union to appeal these grievances to arbitration, we are by this letter appealing these grievances to arbitration as we have a right to do under Article XXII, Paragraph "A" of the collective bargaining Agreement. We are hopeful that your representatives will promptly meet with Company representatives for the purpose of selecting arbitrators to hear and determine these grievances in accordance with Paragraph "B" of Article XXII of the Agreement.

In view of the fact that the two grievances referred to in your letter of July 24, 1969, are arbitrable under the terms of the Agreement, any strike by your Union would be in violation of Article XXII, Paragraph "F" of the Agreement. Should such a strike occur, we would hold your Union fully responsible for any damage we might suffer as a result of such illegal action. We trust that such a law suit will not be necessary.

Sincerely yours,
ORMET CORPORATION
H. M. O'Brien, Manager
Industrial Relations

August 25, 1969

Mr. H. M. O'Brien
Manager, Industrial Relations
Ormet Corporation
P.O. Box 176
Hannibal, Ohio 43931

Dear Mr. O'Brien:

I am writing in response to your letter of July 30, 1969. An analysis of that letter reveals that you have misconstrued the nature of the grievances filed by the Union as well as the applicable provisions of the collective bargaining agreement presently in effect between the parties.

A brief summary of the relevant events in question may be helpful to place the situation in proper focus. First, as you know, on June 16, 1969, the Company issued a written directive to the Hobart welding crews unilaterally increasing the production requirement to "a minimum of twenty repaired stubs per manshift", advising that this minimum "must be achieved in order to earn an early shower", and threatening to take "appropriate disciplinary action" if "twenty welds per manshift were not achieved without proper cause". In direct response to and for the purpose

of protesting this newly established production standard for rod assembly welders in the rodding room, the Union filed grievance No. 1419.

As reflected most particularly in the Union's statement of position at the fourth step and the Company's response thereto, it is self-evident that both parties recognize that the crux of this serious contract dispute is the Company's newly established production standard and not, as your letter of July 30 now suggests, simply a controversy concerning the meaning of the wash up time provision (Art. III B) of the agreement.

Indeed, as concerns grievance No. 1419, it is only with respect to such changed production standards that we have asserted our right to strike. Insofar as there is a wash up time controversy it is an incident of and solely the result of the Company's mentioned unilateral change in production standards. To the extent grievance No. 1419 involves a wash up time dispute we are prepared to arbitrate that limited dispute. However, as concerns the major element of grievance No. 1419—namely, the dispute over the changed production standards which is at the heart of the employees' discontent—we reiterate our contractual right to strike at the appropriate time under the contract.

The agreement (Art. XXII) explicitly provides (at paragraph C) that "the subjects of . . . contracting out and production standards are by this section excluded from arbitration . . .". Consistent therewith, the agreement further provides (at paragraph F) that in lieu of arbitration, the Union has a right to strike, *inter alia*, over these two non-arbitrable issues, subject to the requirement that it follow a prescribed grievance procedure and then give the Company sixty days notice in writing.

The Union has complied with the procedural prerequisites to striking over the production standards dispute (See our letter of July 24, 1969) and, accordingly, any strike which

subsequently occurs because of the Company's aforementioned newly established production standards will not violate the no strike provision of the agreement. (See Art. XXII, paragraph F).

We now turn our attention to grievance No. 1459. That grievance relates, plainly and simply, to the Union's protest of the Company's action (commencing on or about June 25, 1969) in contracting out the repairing of rod assembly stubs without Union approval. That contracting out lies at the heart of this dispute is reflected, once again, by the Company's own statement of position in the fourth step disposition where you attempted to justify your decision to contract out this work on economic and operational grounds.

Article XXII of the agreement, as quoted above, is likewise clear and explicit—"contracting out" disputes are excluded from arbitration and, conversely, the Union has a right to strike over such disputes in accordance with the procedures set forth in paragraph F thereof. This is precisely what the contract says and means.

Accordingly, the belated attempt in your letter of July 30 to carve out an *exception* to this right to strike over a contracting out dispute in circumstances where subcontracting is allegedly made necessary by the alleged refusal of the employees to perform their work assignments is unavailing. The language of the agreement is not susceptible to any such strained construction. Irrespective of the motivating force behind the Company's decision to contract out work, once a dispute arises because of that decision the Union has a right to strike in protest of the contracting out.

I would hope that you will recognize and appreciate, as you must under the contract, the soundness of the Union's legal position and the seriousness of our intention to strike in protest of the Company's newly established production standards and the contracting out of repairing rod assembly stubs. Accordingly, I would urge that you withdraw your

request for arbitration of the production standards dispute of grievance No. 1419 and the contracting out dispute of grievance No. 1459. They do not present arbitrable issues; and for this reason we shall not join in your request to submit them to arbitration.

Needless to say, none of my foregoing comments are relevant to the third set of grievances filed by the Union (i.e. group grievance No. 1479) to protest the disciplinary action imposed upon numerous individual employees in the carbon rodding department for their alleged "constribution to (the) sub-standard quantity of work". Those grievances raise separate questions and are, without question, arbitrable.

Sincerely,
Homer E. Bussa, Director
District 23

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IN THE

Supreme Court of the United States

October Term, 1969
No. 768

THE BOYS MARKETS, INC.,

Petitioner,

vs.

RETAIL CLERKS UNION, LOCAL 770,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

Petitioner files herewith its reply to the brief for Respondent and the brief *amicus* for the American Federation of Labor and Congress of Industrial Organizations pursuant to the provisions of Rule 24 and Rule 40 of this Court.

I

The Norris-LaGuardia Act Is Entirely Inconsistent With the Objectives of Federal Labor Policy Under Section 301

The fundamental premise of the arguments made in the brief for *amicus,* American Federation of Labor and Congress of Industrial Organizations (hereinafter "AFL-CIO"), is that the Norris-LaGuardia Act is basically consistent with the federal law of labor arbitration (Br. 3; 14).

The argument is that a basic element of the federal law of labor arbitration under collective bargaining agreements requires the adjudication of disputes under such contracts by arbitrators and not the courts, and that this basic element, therefore, echoes the prohibitions against the use of injunctions enacted by Congress in the 1932 Act.

This underlying premise will not bear examination. A principal objective of the federal labor law is the substitution of arbitration for industrial strife. Implicit in the emphasis that has been placed upon the development of the arbitration process as a means of resolving grievances between employers and unions is the elimination of the strike in breach of a contract. If arbitration is to be a genuinely effective substitute for economic pressure and if industrial warfare is indeed to be done away with, then an effective and immediate remedy must be available against the labor organization that chooses not to honor its contractual commitment not to strike but instead to arbitrate in an effort to force the employer to bend to its will without regard to the contract. Thus, the Norris-LaGuardia Act is not at all consistent with this policy. If the Norris-LaGuardia Act is not accommodated with Section 301, the effectuation of the federal law of labor relations will be frustrated.

II

The Present Rule Under Sinclair Has Not Achieved Parity of Bargaining Power

Respondent and *amicus* assert that presently there is a parity of bargaining power or strength which would be disturbed should *Sinclair* be overturned. (See R. Br. 15-16; AFL-CIO Br. 17-18).

The argument is made that there is a balance or parity under present law because neither party may obtain judicial restraint against the other prior to arbitration. It is asserted that the balance would be tipped in favor of employers if injunctions against breaches of no-strike clauses could be obtained, because it is contended that unions could not seek similar restraint of employers to prevent action affecting the working conditions and rights of employees.

Upon analysis, the true thrust of this argument is simple: that, prior to the decision of an arbitrator, labor organizations under federal law should be free to violate covenants not to strike at any time they disagree with action taken by the employer. Thus, Respondent and *amicus* would take the position that the federal law of labor relations is best effectuated by a policy which would subject the employer to all of the economic pressure of a strike in breach of contract, regardless of the merits of the dispute and regardless of the amount of time necessary to permit completion of the arbitration process. It is difficult to see the parity or equality of such a rule. The acts of employers affecting working conditions of employees may be remedied in arbitration with complete justice to the employees involved. The remedies of reinstatement, back pay and the like are certainly adequate to restore and make whole affected employees. Also, the discre-

tion of the arbitrator in fashioning a remedy is very broad. On the other hand, a strike shutting down a business is of an entirely different order.

A strike in breach of contract effectively upsets the parity of power that is established by a labor agreement which requires submission of disputes to arbitration without resort to economic action. Thus, a true inequality exists under *Sinclair*.

The argument is also made that overturning *Sinclair* would permit employers to seek restraint against unions but would withhold the availability of similar restraints against acts of employers. The argument is not well taken. Accommodation of Norris-LaGuardia with Section 301 would obviously provide equal access to the judicial process by employers and labor organizations alike. Thus, a no-strike/arbitration agreement is invariably also a no-lockout/arbitration agreement. Section 301 makes both sides of the commitment to arbitrate rather than to use economic force equally enforceable by the courts. See *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U.S. 95 (1962).

The essence of the unions' "parity" argument, and indeed of their whole position, is that the no-strike clause is just another provision of the contract, the breach of which can be dealt with, if at all, only by an arbitrator, at least in the first instance. The truth of the matter, however, is that the no-strike commitment is the other side of the agreement to arbitrate and is inseparable from it, and that a court's power under § 301 to enforce the agreement to arbitrate is rendered illusory by its inability under *Sinclair* to enforce the concomitant agreement not to strike. A court order to a union to arbitrate a grievance it has

pledged to arbitrate, rather than strike over, is wholly without substance if it does not reach the strike which is the very essence of the refusal to arbitrate.

III

The Power To Restrain Strikes in Breach of Contract Is Not Inappropriate, and Abuse of Such Power Is Not To Be Expected

The timeworn arguments against the use of equitable remedies by Federal Courts in the context of labor relations disputes are again advanced. (AFL-CIO Br. 18-22).

Little need be said in defense of the Federal Courts and their ability or competence properly to adjudicate the issues between an employer and a labor organization which has engaged in a strike in violation of its labor agreement. We submit that the record of the decisions of the courts since *Lincoln Mills* is eloquent testimony in contradiction to the contention that even as guided by this Court they cannot be trusted with equity powers in such matters.

As the present case shows, there is seldom any inherent complexity in the question whether a labor organization is engaging in a strike in breach of contract. Certainly, no more complexity is involved than in the correlative cases in which the court is required to determine whether a dispute is arbitrable under a labor agreement upon a suit to compel arbitration. Respondent and *amicus* do not urge that the Federal Courts are not competent to determine the issue of arbitrability in the context of a suit to compel arbitration, and thus, their fears that the courts would, however, be incapable of determining whether a strike is in breach of a contract to arbitrate and not to strike are unfounded.

Many collective bargaining contracts simply contain a flat prohibition against strikes during their term. Other contracts couple the no-strike pledge with matters subject to arbitration. Finally, a few permit the right to strike under certain given circumstances. The point is that determination of whether a labor organization is in violation of these provisions can most certainly not be deemed to be beyond the competence of a trial court, and, as we have said before, the courts must, in any arbitration dispute, determine whether the dispute is arbitrable under the agreement in question. Regardless of the possible complexity of the agreement before the court, the determination is often the same in both instances. Further, where the dispute is not within the scope of the arbitration clause or where there is no arbitration clause, § 301 clearly requires the Federal Courts to adjudicate the merits of a dispute arising under such a labor agreement.

It is implicit that in restraining a strike in violation of contract, a court would not be involved or engaged in the adjudication of the merits of the dispute which caused the strike. To the contrary, all that is involved is the enforcement of the union's promise not to strike so as to make meaningful the promise to arbitrate the underlying dispute.

IV

Agreements for "Quickie" Arbitration Procedures Are Not a Substitute for Judicial Remedies

The proposition is advanced that injunctive remedies are not really necessary because employers and unions can agree to so-called "quickie" arbitrations and then invoke the power of the courts to confirm the award of the arbitrator. (AFL-CIO Br. 27-32).

Far from being the practical compromise it is asserted to be, the "quickie" arbitration proposition is simply a concession by unions unwilling to acknowledge the implications of *Avco,* but faced with them nonetheless, that § 301 does indeed permit the Federal Courts to enjoin strikes in breach of contract.[1] A pre-arbitration injunction against a strike to undercut arbitration is no less, and is actually more, supportive of arbitration than a post-arbitration injunction against such a strike. Also, the assumption that "quickie" arbitration will necessarily put an arbitrator between the court and the strike is false, for there is nothing to justify the supposition that court intervention to compel compliance with a "quickie" arbitration clause will be needed any less than court intervention to compel compliance with any other arbitration clause. Furthermore, there is no reason to suppose that an arbitrator is better able than a court to clear the air, judge the issues, and enforce a ruling when a union or the employees are resisting arbitration or claiming the right to resist. Section 301 calls upon the court to do just those things. Indeed, a court, as an outside authority, is far better able to deal effectively with the assault on arbitration which a strike in breach of contract necessarily is, and to restore the situation so that arbitration can be effective,

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[1] This concession that injunctions against strikes in breach of contract are in fact necessary and desirable also devalues all assertions that damages and discipline effectively remedy strikes in breach of contract in the usual case. Such assertions, we respectfully submit, partake of disingenuousness or naiveté. They are of a piece with Respondent's argument (Br. 13) that the brevity of the strike in this case demonstrates that strikes in breach of contract are not a serious problem. The strike here lasted only one day *because it was enjoined.*

than is an arbitrator, who is dependent upon the good will and acceptance of both parties for his ability to function.

The "quickie" arbitration is no solution, and its possible use forms no basis upon which the determination of this Court may be made. Needless to say, whatever effectiveness in remedying breach of contract strikes the procedure might be said to have in theory, it has not been frequently found in labor agreements, and its use depends entirely upon the willingness of labor organizations to enter into such contracts. Without doubt, whatever superficial attraction the theory may have, it is valueless to employers dealing with labor organizations that will not consider the idea or who are bound to long-term contracts which make no such provisions. The question of the meaning of § 301 does not turn upon whether or not the contract provides for "quickie" arbitration. There is no justification in § 301 for unions to be permitted to insulate themselves from meaningful implementation of § 301's policy favoring arbitration by the imposition of the requirement that "quickie" arbitration be first negotiated, or for employers to be required to obtain such agreements before § 301 can be effectuated, even in part, for them.

Of equal importance is the fact that the word "quickie" is a practical misnomer and that "quickie" arbitrations are an illusion. The time required to choose and/or bring in the arbitrator and to convene the hearing (even accepting the dubious assumption that proponents of the strike will cooperate to implement these procedures promptly), and to make the record and render an award, is very likely to be prolonged. Any delay will very likely force the employer

to submit to the union's will and deprive him of his rights under the contract. The pressure will become greater when the union refuses to obey the arbitrator's award, thus requiring the employer to suffer for the additional time necessary to obtain enforcement by the Federal Court. To emphasize this point, the contract involved in the *New Orleans Steamship* case cited by *amicus* required submission to arbitration within 72 hours and an award within 12 hours. But, as the facts of the case show (AFL-CIO Br. 28), the hearing in that case commenced on October 8, 1965, and lasted for four days. The arbitrator's award was not handed down until December 13, 1965, over two months later. It can hardly be urged that such a "quickie" procedure realistically provides an effective remedy for an employer. Neither can it be successfully urged that such a procedure is a true substitute of the arbitration process for industrial warfare.

CONCLUSION

For the reasons stated herein and in the prior briefs for Petitioner, it is respectfully submitted that the judgment of the Court below should be reversed with instructions to affirm the order of the District Court granting injunction pending arbitration.

JOSEPH M. MCLAUGHLIN,
WILLIAM B. IRVIN,

655 South Hope Street,
Suite 700,
Los Angeles, Calif. 90017,
(213) 627-5237,

Counsel for Petitioner.

April 15, 1970.